Supreme Court, U.S.
FILED
AUG 3 - 2004
OFFICE OF THE CLERK

No. 04 180

In The

Supreme Court of the United States

GEORGE E. BURLESON,

Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The Appeals Court Of The State Of Mississippi

PETITION FOR WRIT OF CERTIORARI

JAMES BAILEY HALLIDAY, Esq.*
Counsel for Petitioner and for the Southern States Police Benevolent Association
**Counsel of Record*
P. O. Box 6783
Gulfport, MS 39506
(228) 864-6564

Aug. 3, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether, a civil servant may be discharged from employment without a pre-termination hearing.

II. Whether, a civil servant may be denied a timely post-termination hearing.

III. Whether, a civil servant may be twice disciplined for the same reason.

IV. Whether, a civil servant has the right to cross-examine witnesses testifying against him.

V. Whether, a civil service commission may meet in violation of the State of Mississippi's *Open Meetings Act*.

VI. Whether, civil service commissioners, their appointed terms have long expired, may continue serving indefinitely until re-appointed or replaced, when no provision of law exists for them doing so.

VII. Whether, a civil servant's employment may be terminated based upon unnoticed charges of misconduct.

LIST OF PARTIES

Parties to the proceedings are those listed in the caption, to wit:

PETITIONER:

1. George E. Burleson

RESPONDENTS:

1. Hancock County Sheriff's Department Civil Service Commission
2. Hancock County Sheriff Steve Garber
3. Former Hancock County Sheriff Ronald Peterson

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
A. Proceedings and Disposition in Lower Courts	3
B. Facts	12
Reasons for Granting the Writ	13
I. The issues presented are of exceptional importance to law enforcement officers, and all public servants, concerning the enforceability of due process protections constitutionally afforded them.	13
II. The Court of Appeals for the State of Mississippi has decided important questions of federally granted due process rights involving civil service in a way that conflicts with relevant decisions of this Court	14
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Banks v. City of Greenwood, 404 So.2d 1038 (Miss. 1981) 22

Bowie v. City of Jackson, 816 So.2d 1012 (Miss. 2002).... 6, 16

Bullock v. Miss. Emp. Security Com'n, 697 So.2d 1147 (Miss. 1997) 22

Bulloch v. City of Pascagoula, 577 So.2d 1234 (Miss. 1991) 17

Chandler v. City of Jackson Civ. Service Commission, 687 So.2d 142 (Miss. 1997)..... 23

City of Jackson Police Department v. Ruddick, 234 So.2d 566 (Miss. 1971)..... 22

City of Laurel v. Samuels, 469 So.2d 530 (Miss. 1985) 22

City of Meridian v. Johnson, 593 So.2d 35 (Miss. 1992) 17, 22

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) .....*passim*

Cuellar v. Texas Emp. Com., 825 F.2d 930 (5th Cir. 1987) 18

Edit v. City of Natchez, 382 So.2d 1093 (Miss. 1980)... 15, 22

Extension of Boundaries of Itta Bena, 788 So.2d 747 (Miss. 2001) 25

Fuentes v. Shevin, 407 U.S. 67 (1972)..... 6

Gilbert v. Homar, 520 U.S. 924 (1997)..... 18

Goldberg v. Kelly, 397 U.S. 254 (1970) 18

Goss v. Lopez, 419 U.S. 565 (1975)..... 15

TABLE OF AUTHORITIES – Continued

Page

Grant v. City of Columbus, 812 So.2d 976 (Miss. 2002) 22

Grupo Dataflux v. Atlas Global, 124 S. Ct. 1920 (1999) 12

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 24

Hill v. City of Pontotoc, Miss., 993 F.2d 422 (5th Cir. 1993) 23

Ladnier v. City of Biloxi, 749 So.2d 139 (Miss. App. 1999) 19, 21

Little v. City of Jackson, 375 So.2d 1031 (Miss. 1979) 15, 16, 17

Mathews v. Eldridge, 424 U.S. 319 (1976) 14

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 24

Nichols v. City of Jackson, 848 F. Supp. 718 (S.D. Miss. 1994) 6, 16

Norwood v. In re Extension of the Boundaries of Itta Bena, 788 So.2d 747 (Miss. 1999) 25

Richardson v. Perales, 402 U.S. 389 (1971) 10, 18

Shipman v. North Panola Consol. Sch. Dist., 641 So.2d 1106 (Miss. 1994) 11, 22

Simpson v. City of Gulfport, 121 So.2d 409 (Miss. 1960) 25

Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976) 16, 17

Watson v. City of Pascagoula, 577 So.2d 1234 (Miss. 1991) 22

TABLE OF AUTHORITIES – Continued

Page

CONSTITUITIONAL PROVISIONS

Fifth Amendment to the United States Constitution..... 2

Fourteenth Amendment to the United States Constitution..... 2

MISSISSIPPI STATUTES

Miss. Code Ann. Section 25-41-1 (1976) *Open Meetings Act*.....2, 10, 11, 21, 22

OTHER MATERIALS

Local and Private Laws of the State of Mississippi, Ch. 802, House Bill 133, *Civil Service Commission for Hancock County Sheriff's Department* (March 20, 1990), reproduced in App. H, 37a 2, 5, 11

PETITION FOR WRIT OF CERTIORARI

George E. Burleson respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the State of Mississippi, in this case.

OPINIONS BELOW

The decision (without published opinion) of the Mississippi Supreme Court (App. E, 31a) is reported at 873 So.2d 1032 (Miss. 2004).

The opinion of the Court of Appeals of the State of Mississippi (App. A, 1a) is reported at 872 So.2d 43 (Miss. 2003).

The order of the Circuit Court of Hancock County, Mississippi (App. D, 23a) Cause No. A2301-01-0160 (2002).

The Findings of Fact of the Hancock County Sheriff's Department (July 2, 2004) (App. C, 20a).

JURISDICTION

The denial of Petitioner's Writ of Certiorari to the Supreme Court of Mississippi was entered on May 6, 2004. The issues presented to and resolved by the Court of Appeals for the State of Mississippi created a conflict within the meaning of Sup. Ct. Rule 10(b) and (c).

The jurisdiction of this Court is timely invoked by Petitioner pursuant to 28 U.S.C. § 1257 and 28 U.S.C. § 2104. Petitioner invoked issues of federal due process throughout the proceedings below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 14, which provides in part: " . . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

U.S. Const. Amend. 5, which provides in part: " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Miss. Code Ann. § 25-41-1 (1975), known as the *Open Meetings Act*, reproduced in App. G, 35a, which requires public business to be conducted in public and provides in part:

> "It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner . . . it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings. . . . "

Ch. 802, House Bill 133, Local and Private Laws for the State of Mississippi (1990), reproduced in App. H, 37a, and provides in part:

> "An act to . . . create a civil service commission for the Hancock County Sheriff's Department . . . to prescribe the procedures for removal, suspension, demotion and discharge of persons covered by the civil service system. . . . "

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Lower Courts.

At every level, from the first hearing before the civil service commission to the Mississippi Supreme Court, Petitioner, supported by the efforts of his fellow officers, through his membership in the Southern States Police Benevolent Association, raised the federal questions sought to be reviewed here. At every level, the sheriff, his personally picked civil service commissioners, the Circuit Court, the Court of Appeals for the State of Mississippi and finally the Mississippi Supreme Court have ignored the controlling decisions of law by this Court.

This is a case especially warranting the Court's attention and consideration concerning the constitutionally mandated due process afforded public servants who dedicate themselves to the service of others. The Mississippi Legislature, realizing the necessity of protecting those public servants serving in law enforcement from the political will of personal whim, enacted a series of laws granting civil service protections designed to minimize the long existing good 'old boy' or as they say in the deep south 'ole boy' systems endemic in Mississippi. Local law enforcement officers have always been subjected to leadership by tyrannical dictatorship in balkanized fiefdoms of fiat where the sheriffs, chiefs of police and the mayors essentially operate under the 'do it' rule. They just do what they want to do (just do it) regardless of federally mandated due process protections afforded individual officers by their civil service status. Protections at times that are unfortunately only as good as the paper they are written due to the lack of enforcement.

Certainly, all empathize with the defendant, in the classic movie *To Kill a Mockingbird*, who dared to kiss a white woman and was put on trial for an alleged crime that really only involved going against the blatantly discriminatory dictates of the time. These discriminatory dictates have been rightfully eradicated against persons of color or other minority status. However, in Mississippi, a 'second class citizen' still exists, the law enforcement officer. While not a slave, the law enforcement officer is often treated as a public serf: One that, despite the continued efforts of federal courts, is still routinely subjected to the political whims and individual will of those politicians deftly defying and other times slyly circumventing controlling civil service rules and related regulations to personally dictate the professional lives of their officers.

Petitioner's case is still unfortunately the usual series of unfortunate events in Mississippi instead of the exception concerning the state's 'second class' citizens treated as public serfs. Few officers, when improperly disciplined or wrongfully discharged, have either the resources or the necessary support to challenge the powers to be.

Petitioner first raised the issue of the requirement of a pre-termination hearing, which he was denied, to the sheriff's civil service commission. The commission denied Petitioner's request stating in its *Finding of Fact* (App. C, 21a) (After being forced to issue one by order of the Mississippi Court of Appeals, App. B, 18a) that:

> "The Commission finds that no pre-termination hearing was required due to the danger of immediate harm to the County and the Sheriff's Department" App. B, 21a.

This Court has ruled on the issue of 'immediate harm' concerning the requirement of a pre-termination hearing and ruled that an employee allegedly constituting such a threat can be suspended pending a pre-termination hearing. But that at a minimum a pre-termination is required. See: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

Petitioner raised the same issue of denial of a pre-termination hearing to the Circuit Court. Again, controlling authority was ignored. The circuit court held that:

> "The second issue for review is whether Burleson's discharge without a pre-termination and/or post-termination hearing violated his rights under the *Civil Service Rules and Regulations*. Rule 1.3 provides: 'The sheriff may, *in his discretion*, provide for a pre-termination hearing . . . and *if* a pre-termination hearing is to be held. . .' Clearly the rules do not mandate a pre-termination hearing . . . " (emphasis added by the circuit court). App. D, 26a-27a.

On appeal, Petitioner raised this issue to the Mississippi Supreme Court and the case was assigned to the Court of Appeals for the State of Mississippi. Again, controlling authority was ignored, this time by the appellate court which stated in its opinion concerning Petitioner's assertion concerning the required pre-termination hearing:

> "The sheriff's decision whether or not to grant a pre-termination hearing is discretionary." App. A, 7a.

These opinions by the Circuit Court and the Court of Appeals are directly contrary to the ruling of this Court.

Pre-termination hearings are not discretionary. *Id.* The Supreme Court of Mississippi has even extended this Court's rationale as held in the Court's *Loudermill* decision to extend to situations involving suspensions of civil servants by requiring a pre-suspension hearing. *Bowie v. City of Jackson Police Department*, 816 So.2d 1012 (Miss. 2002), citing favorably *Nichols v. City of Jackson*, 848 F. Supp. 718 (S.D. Miss. 1994) at 720.

The facts are not in dispute; Petitioner was immediately terminated without the required pre-termination hearing. As stated in this Court's opinion in *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972), no amount of post-termination process can undo pre-deprivation violation once it has occurred as this is the only opportunity to invoke the discretion of the decision maker (i.e., employer) prior to the actual decision confirming termination.

After Petitioner's abrupt termination, Petitioner raised the due process issue of a timely post-termination hearing as he did not receive a hearing within twenty (20) days of his immediate termination as required by the civil service rules for the Hancock County Sheriff's Department, reproduced in App. H, 37a, which states in part:

> " . . . such employee may be terminated without a pretermination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within twenty-four (24) hours after the termination, and shall be given an opportunity for a hearing similar to the pretermination hearing . . . within twenty (20) days after the date of termination." App. H, 43a.

The civil service commission failed to address this issue of not having a timely post-termination hearing within twenty days as required only pronouncing:

> "George E. Burleson was afforded a full opportunity at the hearing . . . " App. C, 21a.

The circuit court stated concerning this same due process issue:

> " . . . the Court finds the hearings conducted by the Commission afforded Burleson the rights and protections to which he was entitled under the Civil Service system. The Court therefore finds no merit to this issue." App. D, 27a.

The circuit court further opined:

> "There is no presumption that rights of constitutional magnitude have been infringed by the mere passage of time." App. D, 28a.

This ruling is contrary to Justice Brennan's holding in *Loudermill* that at some point the passage of time alone invokes a due process violation.

Upon review, the Court of Appeals for Mississippi stated:

> "Burleson was not informed of any action the Commission was taking until forty-eight days after his written request for a post-termination hearing. We follow the same analysis here as we did in the pre-termination hearing issue . . . While it is important to Burleson to have a quick decision . . . it is also important that a proper investigation be conducted by the Commission . . . We do not find in the record a petition for a writ ordering a hearing within twenty days of request . . . we find that Burleson failed to press the issue

> . . . even if he had, the Commission is allowed the flexibility to properly investigate the matter." App. A, 9a.

These rulings and opinions are non-sensical in that once a state grants a property interest, the state does not have the power to redefine the procedures used to protect that right as this Court made clear in its polestar decision with *Loudermill*. Controlling principles of federal law require a timely post-termination hearing and require that, if a state's procedures properly comport with federal due process, then those procures must be followed.

Petitioner timely raised his third due process issue, that he was subjected to double jeopardy (in that he was disciplined twice, first by demotion and then termination for the same reason). There is no dispute that prior to his termination, Petitioner was transferred from the Investigations Division, where he held the rank of Captain (one of the highest ranks), to the Patrol Division where he was demoted to the rank of Patrolman (the lowest rank).

In its statement of facts, the Mississippi Court of Appeals held that:

> "Burleson was employed by the Hancock County Sheriff's Department. He was assigned to the investigations department. On October 15, 1999, Sheriff Peterson informed Burleson that he was being transferred to the patrol division. The reason given for the transfer was because Sheriff Peterson had been informed that Burleson was an insurance risk . . . On March 13, 2000, Burleson received a written statement that he was being terminated from his employment because of the insurance risk he posed." App. A, 3a.

The Mississippi Court of Appeals held concerning this issue of demotion:

> " . . . The technical definition of a demotion . . . is a reduction to a class having a lower maximum rate of pay. While evidence suggests that a patrol officer does have a lower maximum rate of pay, there is no evidence that Burleson actually received a lower rate of pay. App. A, 6a. Further stating:
>
> " . . . Since Burleson failed to press the issue of his "demotion" until he was terminated, we can only assume that he was transferred and not demoted." App. A, 10a.

With this example of illogical reasoning, it is obvious how hard the appellate court was trying to find a way not to rule in Petitioner's favor on this issue. It is patently evident that Petitioner was first disciplined by transfer and demotion for being an "insurance risk" and later terminated for the very same reason. Whether he was transferred and/or demoted prior to termination is only an exercise in semantics as the result is the same. Two separate consecutive events occurred resulting in some type of discipline being imposed upon the Petitioner for the same reason, i.e., being an "insurance risk." Thus, Petitioner was subjected to double jeopardy and violation of his due process protections.

Petitioner, again from his first appearance appealing his demotion and termination, raised his fourth due process issue by challenging the civil service commission to allow him to confront the witnesses against him by the time honored and judicially grounded means of cross-examination. The commission denied him that right. The

Mississippi Court of Appeals, in considering this issue, stated:

> "We are also skeptical of Burleson's claim of not being allowed to cross-examine witnesses. The other side also was denied the opportunity to cross-examine witnesses. But the saving point of the hearing is that both sides could put on rebuttal witnesses. There is also no mention of whether Burleson could have secured the other side's witnesses as adverse witnesses. There was also no record of Burleson seeking a writ allowing him to cross examine witnesses." App. A, 11a.

This flawed decision seems to be echoing a tome from a legal scholar discoursing on trial procedures during the French Revolution. Any first year law student knows cross-examination is Hornbook law.

While Mississippi decisions erringly hold that such a fundamental right before an administrative body, although highly encouraged, is discretionary, federal courts do not. The right to confront witnesses against an accused is a hallmark of our justice system regardless of what forum. Denial of this right is a violation of due process as made clear by this Court. *Richardson v. Perales*, 402 U.S. 389 (1971).

Not only did the commission prevent Petitioner from cross-examining the witnesses against him, the commission even met in secret and heard testimony from these very same witnesses without informing the Petitioner. When Petitioner uncovered the commission's errant actions, he immediately raised the issue not only as to a gross due process violation but also as to a clear violation of Mississippi's *Open Meetings Act*. This is what the Circuit held:

> " . . . Under the *Civil Service Rules and Regulations*, 'All investigations made by the commission . . . shall be by public hearing, after reasonable written notice to the accused . . . ' The commission's minutes state that . . . attorney Gerald Gex 'explained to the Commission . . . ' and that the Commission requested former Chief Administrator Gerald Necaise 'to give a summary . . . ' However, these same individuals were subsequently called and testified in duly noticed, formal public hearings with Burleson present and represented by counsel. That there was no attempt at subterfuge by the Commission is obvious from the fact that it recorded its actions in its official minutes. Burleson has presented no evidence that the Commission's decision was based upon anything more than was established in the public hearings in his case. Therefore, the Court finds that even if the Commission erred in making its initial contact . . . , the error does not require reversal of the decision." App. D, 28a-29a.

The *Open Meetings Act*, MCA § 25-41-1 (1976), reproduced in App. G, 35a, declares that:

> " . . . it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings . . . "

As to this issue, the Mississippi Court of Appeals held:

> " . . . While Burleson argues for the nullity of any action not taken in strict compliance with the Act, the supreme court has required only substantial compliance, not a nullification of the action taken." *Shipman v. North Panola Consol. Sch. Dist.*, 641 So.2d 1106, 1116 (Miss. 1994). And further:

> " . . . While we question the investigative process of the Commission, in interviewing the parties separately, we do not think it is a violation of the Open Meetings Act because of the later hearing." App. A, 11a.

Finally, Petitioner argued on appeal, first with the circuit court and then before the Mississippi Court of Appeals, his final due process issue that the Civil Service Commission's decision was null and void because the individual commissioners were all serving years beyond their appointed terms and their terms had expired years before. Therefore, the commission lacked jurisdiction to enforce the discipline imposed consecutively by the two sheriffs. To this issue, the circuit court and the Court of Appeals ruled this issue was untimely raised. Both courts ruled in error, as an issue of 'jurisdiction' may be raised at any time, even for the first time on appeal, as this court has made clear. *Grupo Dataflux v. Atlas Global*, 124 S. Ct. 1920 (1999).

B. Facts

The core facts as determined by the circuit court and the Mississippi Court of Appeals concerning the due process issues raised here are not in dispute. Both courts held that:

1. Petitioner was not afforded a pre-termination hearing.

2. Petitioner did not receive a post-termination hearing within twenty days of his immediate termination.

3. Petitioner was first transferred and/or demoted and then terminated for the same reason.

4. The civil service commission met with witnesses in private without notification to the public or Petitioner.

5. The appointed terms of all three commissioners had long expired years ago without reappointment.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED, OF EXCEPTIONAL PUBLIC IMPORTANCE INVOLVING FEDERALLY GRANTED DUE PROCESS RIGHTS PROTECTING CIVIL SERVANTS, HAVE BEEN DECIDED IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN THAT THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI DENIED PETITIONER BASIC FUNDAMENTAL DUE PROCESS INCLUDING HOLDING THAT A PRE-TERMINATION HEARING IS 'DISCRETIONARY' AND A TIMELY POST-TERMINATION NOT REQUIRED.

The errant actions of civil service commissions, by allowing critical due process violations, continues to grossly retard the proper actions and professional growth of law enforcement in Mississippi. For how can local law enforcement officers be secure enough in their careers to do the right thing, when faced for example with a crime committed by an elected official or prominent citizen or standing up to corrupt practices or other illegal acts, regardless of the potential political repercussions and thus 'career ending' consequences, unless protected by enforceable civil service rules. Rules, by their very nature,

designed to allow law enforcement to independently operate without fear of such political and personal repercussions.

The answer is simple, they cannot. By ignoring civil service rules and denying even the minimum due process required, the commissions and the courts harm us all, not only the Petitioner. Petitioner's case is a classic example of what routinely occurs throughout the state when an elected law enforcement official and his self-appointed civil service commissioners denies a public servant even the minimal due process required and an improper termination abruptly ends a twenty-year career dedicated to public service.

The issues presented are of exceptional importance to law enforcement officers, and all public servants, concerning the enforceability of due process protections constitutionally afforded civil servants.

II. THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI HAS DECIDED IMPORTANT QUESTIONS OF FEDERALLY GRANTED DUE PROCESS RIGHTS INVOLVING CIVIL SERVICE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Court Of Appeals Erred In Affirming That A Pre-Termination Hearing Is Discretionary.

The Mississippi Court of Appeals incorrectly applied the three factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine the amount of due process due Captain Burleson prior to his termination. This Court previously addressed the application of the *Mathews* factors in an analogous circumstance. Indeed, the Court of Appeals

cites this controlling authority but then inexplicably fails to apply it. This Court has held that a public employee/civil servant must have a pre-termination hearing prior to discharge. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Once a state grants certain property interests to a citizen, federal due process protections, under the Fifth and Fourteenth Amendments to the U.S. Constitution, prevent that property from being taken without the proper due process of law. *Goss v. Lopez*, 419 U.S. 565 (1975). Therefore, as Captain Burleson did not have the constitutionally mandated pre-termination hearing, his termination violated the federal due process protections afforded him.

The Court of Appeals' opinion states that the sheriff's decision whether or not to grant a pre-termination hearing is "discretionary." App. A, 7a. This is clearly incorrect according to *Loudermill* and this Court has previously stated what minimum due process is required, as to the minimum pre-termination due process:

> "Where a governmental employer chooses to postpone the opportunity of a non-probationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision." *Id.*

See also: *Little v. City of Jackson*, 375 So.2d 1031 (Miss. 1979) as cited in *Eidt v. City of Natchez*, 382 So.2d

1093, 1094 (Miss. 1980) for the Mississippi Supreme Court correctly analyzing the due process required a civil servant concerning termination.

In fact, the Mississippi Court of Appeals has previously held that not only is *Loudermill* to be followed concerning the required pre-termination due process but also ruled that the minimum due process requirements for pre-termination in *Loudermill* also be followed for pre-suspension due process. *Bowie v. City of Jackson Police Department*, No. 2000-CC-0124-COA (Jan. 22, 2002). Now, the Court of Appeals is stating that the decision " . . . whether or not to grant a pre-termination hearing is discretionary." This is directly contrary to the appellate court's recent holding in *Bowie* and this Court's pronouncements in *Loudermill*.

The United States District Court, S.D. Mississippi, and the Fifth Circuit Court of Appeals (analyzing the required due process required concerning termination of a civil servant in Mississippi), directly rejected the Mississippi Court of Appeals' recent rationale in holding that Petitioner's pre-termination due process is "discretionary." Minimum pre-termination (and according to the Mississippi Appellate Court in *Bowie* pre-suspension due process also) is required and not discretionary and the requirements have previously been clearly set forth by these courts. In *Little*, the Mississippi Supreme Court adopted the Fifth Circuit's requirements (as set forth in *Loudermill*) of the minimum pre-termination procedures required by due process under the Fourteenth Amendment as set forth in *Thurston v. Dekle*, 531 F.2d 1264 (1976). See also: *Nichols v. City of Jackson*, 848 F. Supp. 718 (Miss. S.D. 1994).

There is no argument that these procedures were not followed, as Petitioner did not receive a pre-termination hearing, and thus the Mississippi Court of Appeals plainly erred in ruling that a pre-termination hearing is now "discretionary" and that Petitioner was provided the minimum due process required (by only receiving written notification of termination and the actions he could take if he disagreed) when clearly he was not. App. A, 7a-8a.

The Court Of Appeals Erred In Affirming That A Timely Post-Termination Hearing Is Discretionary.

In *Little*, the Mississippi Supreme Court, affirmatively citing the Fifth Circuit in *Thurston*, clearly stated that an opportunity for an evidentiary hearing within twenty (20) days of termination must be given if required by the civil service rules and regulations. Which is exactly the case here, as the civil service rules require such a hearing within twenty days. App. H, 43a. Contrary to the Court of Appeals, there is no discretion to delay or withhold this time sensitive post-termination due process requirement. App. A, 8a-9a. Further, the Mississippi Supreme Court has ruled that a civil service commission is bound by its own legislatively enacted rules. *City of Meridian v. Johnson*, 593 So.2d 35 (Miss. 1992); citing *Bulloch v. City of Pascagoula*, 577 So.2d 1234 (Miss. 1991). The appellate court's "flexibility to properly investigate" rationale for delay erringly allows total disregard of required due process protections and total disregard for the commission's own controlling rules and regulations. App. A, 8a-9a. As a post-termination hearing must be held within twenty (20) days and Petitioner was not granted a hearing until over one hundred twenty (120) days (ten times the allowable time

frame) after his timely appeal to the commission, the Court of Appeals decision is clearly in error. App. A, 4a.

Further, the Mississippi Court of Appeals cites no controlling or even supporting authority for the pronouncement that as Petitioner "failed to press the issue," by petitioning for a "writ", he somehow abandoned valuable procedural protections. App. 9a. The court cannot, as none exist. Petitioner timely perfected his appeal and requested a hearing and it was the commission's duty to then afford him one comporting with its own rules and regulations, existing state law and federal due process. The commission failed to do so. This Court has held that failure to provide a timely post-termination hearing is a violation of federally protected due process. *Gilbert v. Homar*, 570 U.S. 924 (1997).

The Court Of Appeals Erred In Rejecting The Right To Cross-Examine And Confront Adverse Witnesses.

The Court of Appeals 'skepticism' concerning cross-examination is factually and legally unfounded. App. A, 11a. The rationale that, because the other side was also denied the opportunity to cross-exam, Burleson's rights were not violated is non-sensical. The right to challenge an adverse witness is a hallmark protection of the accused, not the accuser. The right to put on rebuttal witnesses or call adverse witnesses as a "saving point" has been expressly rejected. As this Court has held, denial of the right to confront witnesses by cross-examination in administrative proceedings is a denial of due process. *Richardson v. Perales*, 402 U.S. 389 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cuellar v. Texas Emp. Com.*, 825 F.2d 930 (5th Cir. 1987).

The Court Of Appeals Erred In Affirming That Petitioner Could Be Disciplined Twice For The Same Reason.

The Mississippi Court of Appeals cites the principle that a civil servant should not be punished twice for the same reason, as first pronounced by the Mississippi Supreme Court in *Ladnier v. City of Biloxi*, 749 So.2d 139, 153 (Miss. 1999). However, the Court of Appeals disagrees that Petitioner was disciplined twice for the same reason. The Court's rationale is that, as Petitioner failed to "press the issue" of his demotion until he was terminated, the Court can only "assume" that he was "transferred" and not demoted. App. A, 9a-10a. The Court does not discuss how this assumption is drawn from a failure to "press the issue." The Court of Appeals does not discuss how this leap of logic makes a "transfer" a non-disciplinary event. The Court of Appeals does not cite any controlling or guiding authority. Regardless of whether or not Petitioner properly "pressed the issue", the record is replete with testimony regarding two consecutive 'disciplinary events' stemming from the same incident (*All* witnesses testified that he was in fact disciplined by "demotion"). The circuit court in its order discussed in detail the events leading up to Petitioner's termination:

> "According to former Sheriff Peterson, Burleson's actions in the Benvenutti and Poole cases prompted him to transfer Burleson from investigations to patrol in November 1999. Sheriff Garber testified he decided to terminate Burleson based on consideration of the insurance problems, potential liability and lawsuits against the county. . . . " App. D, 25a.

Whether or not Petitioner properly appealed his first discipline (of whatever nature) is of no moment. There is no requirement that the first disciplinary event must be challenged in order to challenge a second subsequent disciplinary event resulting from the same incident or same nucleus of operative fact as the first. The hallmark of our judicial system is that a person cannot be punished twice for the same act. Even when pleading guilty (thereby not contesting either the charge or the punishment), a person has the absolute right not to be punished again for that which he already pled guilty and received punishment, as jeopardy has firmly and irrevocably attached.

The civil service commission in its Findings of Fact determined that although Petitioner's transfer from the investigations division to the patrol division was not a demotion, the commission did determine that it was a disciplinary event, stating:

> "The transfer of George E. Burleson from Investigations to Patrol by Sheriff Peterson was not a demotion, as it did not involve a change in pay, grade or benefits. Further, that George E. Burleson failed to appeal same within ten (10) days of the *disciplinary* action." (emphasis added) App. C, 20a.

There is no issue that Petitioner properly appealed his subsequent termination and timely asserted his termination was improper, for a number of reasons, including that he had been previously disciplined for the same reason (i.e., being an "insurance risk"). App. A, 2a-4a.

The record is clear. Contrary to the Mississippi Court of Appeals incorrect rationale, nothing needs to be "assumed." App. A, 10a. The commission determined that his transfer was a "disciplinary action" and the record is

replete with uncontradicted testimony from all parties involved and every witness regarding the discipline by former Sheriff Ronnie Peterson and subsequent discipline by Sheriff Steve Garber with all parties testifying that Petitioner was first "demoted" and then "terminated" for the same reason. All witnesses testified that both "disciplinary actions" (demotion and termination) were taken against Petitioner because of his alleged involvement in the same two claims/lawsuits against the sheriff's department. Regardless of what "term" the Court uses to define the two consecutive disciplinary events (the Court of Appeals refers to a "transfer") (App. A, 10a) the record is clear that all parties testified that "discipline" occurred twice for the same alleged reasons. Consecutive discipline is improper and once disciplined (by whatever means), Petitioner was constitutionally protected from further discipline of whatever nature concerning the same incident. Thus, his subsequent termination was improper. As clearly stated by the Mississippi Supreme Court in a case of first impression:

> "If a civil servant was disciplined once for certain misconduct, it follows that good cause would not then exist to sustain the employee's later discharge." *Ladnier v. City of Biloxi*, 749 So.2d 139, 153 (Miss. 1999).

The Court Of Appeals Erred In Ruling That The Commission Did Not Violate The *Open Meetings Act* And Did Not Meet In Violation Of The Commission's Own Rules.

The rule is clear, the Mississippi Supreme Court has stated that an administrative body, such as a civil service commission, is bound by its legislatively enacted rules and

regulations. *Bullock v. Miss. Emp. Security Com'n*, 697 So.2d 1147 (Miss. 1997). The Court of Appeals therefore properly questioned the investigative process of the commission when meeting in secret with adverse witnesses. App. A, 11a. The Court, however, erred in relying on a previous decision of the Mississippi Supreme Court holding that only substantial compliance is required. *Shipman v. North Panola Consol. Sch. Dist.*, 641 So.2d 1106, 1116 (Miss. 1994). The Mississippi Supreme Court's opinion in *Shipman* can be distinguished. In *Shipman*, this Court found "substantial compliance" in response to technical violations of the *Open Meetings Act*. Here, there was zero compliance until Petitioner forced compliance. In fact, the commission admitted (at the first so-called "hearing" that Petitioner and counsel were notified of and attended) that the commission had *never* complied with the Act. Therefore, by the commission's own admissions (that the normal course of business was to meet privately with each party separately and then reach a decision, etc.), the commission had repeatedly violated controlling state statutory law without ever having even substantial compliance. The Mississippi Supreme Court has consistently held that a commission's failure to follow legislatively mandated statutory rules and regulations, as well as, its own rules nullifies the commission's actions. See: *Grant v. City of Columbus*, 812 So.2d 976 (Miss. 2002) citing *City of Jackson Police Department v. Ruddick*, 234 So.2d 566 (Miss. 1971); *City of Meridian v. Johnson*, 593 So.2d 35 (Miss. 1992); *Watson v. City of Pascagoula*, 577 So.2d 1234 (Miss. 1991); *City of Laurel v. Samuels*, 469 So.2d 530 (Miss. 1985); *Banks v. City of Greenwood*, 404 So.2d 1038 (Miss. 1981); *Eidt v. City of Natchez*, 382 So.2d 1093 (Miss. 1980).

The commission's rules are clear and unequivocal; "All investigations . . . shall be by public hearing, after reasonable written notice to the accused . . . " App. H, 44a. The term "shall" leaves no room for interpretation by the commission according to the Mississippi Supreme Court. *Chandler v. City of Jackson Civil Service Commission*, 687 So.2d 142 (Miss. 1997). As there was no substantial compliance with the act or with the commission's own rules and regulations, the actions of the commission concerning Burleson are nullified and cannot be affirmed.

Meeting in secret with accusing and adverse witnesses smacks of Orwellian big brother procedures and star chamber justice.

The Court Of Appeals Erred In Affirming Petition's Discharge Based On Unnoticed Charges Of Misconduct.

Only when the Court of Appeals ordered the commission to issue a Finding of Fact, was the petitioner advised that the commission had relied upon unnoticed and unsubstantiated charges (nothing exists in the record) in finding that Burleson showed "inattention to duty, incompetence, and discourteous treatment of the public . . . " App. C, 21a. As Petitioner was never advised or even aware of any "charges" against him, except the unexplained statement by the Sheriff that he was an "insurance risk", App. A, 3a, the commission's (and now the Mississippi Court of Appeals') reliance on these findings to support his termination is patently improper. Discharge, without notice or opportunity to respond to charges of misconduct, has been expressly rejected as a gross due process violation and re-instatement required. *Hill v. City of Pontotoc*, 993 F.2d 422 (5th Cir. 1993).

Considering the far reaching consequences of not receiving notice and a fair opportunity to rebut, this Court recently held concerning the issues of due process concerning detained citizens classified as enemy-combatants that:

> "We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) citing generally *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). Also stating:
>
> "An essential principle of due process is that a deprivation life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Hamdi* at 2673 quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950).

It is clear, based on the decisions of this Court, that Petitioner, as a citizen who dedicated twenty years of his professional life to the service of others, deserves as much due process as a fellow citizen captured during war while fighting for the enemy. It is equally clear that Petitioner never received notice of the charges of misconduct against him nor an opportunity to respond.

The Court Of Appeals Erred In Ruling That The Issue Of The Commission's Serving Beyond Their Appointed Terms Was Not Properly Before The Circuit Court.

While new issues may not be raised for the first time on appeal, the exception is the issue of jurisdiction. The

lack of authority of a judicial or quasi-judicial body may be raised at any time. As this is an issue of jurisdiction, it was therefore properly raised. *Extension of Boundaries of Itta Bena*, 788 So. 2d 747 (Miss. 2001). The Court of Appeals mistakenly relies upon a decision from 1892 (involving a holdover elected official), which, is in no way analogous with the circumstances before this Court. As the actions were taken by appointed commissions whose certain terms had long expired without any existing statutory authority to holdover, a quorum never existed and their actions concerning Petitioner were invalid. *Simpson v. City of Gulfport*, 121 So.2d 409 (Miss. 1960).

CONCLUSION

For the foregoing reasons, that Petitioner was denied a pre-termination hearing, a timely post-termination hearing, was disciplined twice for the same reason, was denied the right of cross-examination of witnesses against him, was not present during secret meetings by the commission with these witnesses, was not informed of the unnoticed charges that the commission, relied upon to affirm his termination and because the commissioners were all serving years beyond the expiration of their appointed terms without reappointment, Petitioner respectfully urges the Honorable Supreme Court of the United States to grant his petition and issue a Writ of Certiorari to review

the judgment of the Court of Appeals for the State of Mississippi.

Respectfully submitted,

George E. Burleson
By and through his attorney
and on behalf of the
Southern States Police
Benevolent Association

JAMES BAILEY HALLIDAY
Attorney at Law
P. O. Box 6783
Gulfport, MS 39506
(228) 864-6564

August 3, 2004

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 2002-CC-00411-COA

GEORGE E. BURLESON **APPELLANT**

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON **APPELLEES**

DATE OF TRIAL COURT JUDGMENT:
2/21/2002

TRIAL JUDGE:
HON. ROBERT H. WALKER

COURT FROM WHICH APPEALED:
HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:
JAMES BAILEY HALLIDAY

ATTORNEY FOR APPELLEE:
ALBERT LIONEL NECAISE

NATURE OF THE CASE:
CIVIL – OTHER

TRIAL COURT DISPOSITION:
AFFIRMED COMMISSION FINDING APPROVING TERMINATION OF CIVIL SERVANT.

DISPOSITION:
AFFIRMED – 11/18/2003

MOTION FOR REHEARING FILED:

CERTIORARI FILED:

MANDATE ISSUED:

EN BANC

MYERS, J., FOR THE COURT:

¶1. The Hancock County Circuit Court upheld the Hancock County Sheriff's Department's Civil Service Commission's (Commission) decision to uphold George Burleson's termination as a deputy. It is from that decision that Burleson appeals asserting:[1]

1. HE WAS DEMOTED IN VIOLATION OF THE CIVIL SERVICE RULES AND REGULATIONS;

2. HE WAS DENIED DUE PROCESS BY HIS DISCHARGE WITHOUT A PRE-TERMINATION HEARING;

3. HE WAS NOT GIVEN A POST-TERMINATION HEARING WITHIN TWENTY DAYS OF HIS REQUEST;

4. HE WAS SUBJECTED TO DOUBLE JEOPARDY;

5. HE WAS DENIED DUE PROCESS BECAUSE OF THE LENGTH OF TIME FOR THE COMMISSION'S DECISION;

6. THE COMMISSION HELD MEETINGS IN VIOLATION OF ITS RULES AND THE OPEN MEETINGS ACT;

---

[1] We have restructured the issues to facilitate a better understanding of the nature of this appeal. While Burleson asserted twenty issues, many of the issues were repetitive in nature and are capable of being discussed within other issues.

7. THE JUDGMENT OF THE COMMISSION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE;

8. THE JUDGMENT OF THE COMMISSION WAS ARBITRARY AND CAPRICIOUS AND BEYOND THEIR AUTHORITY;

9. THE COMMISSION FAILED TO SET FORTH ANY FINDINGS OF FACTS OR CONCLUSIONS OF LAW.

STATEMENT OF FACTS

¶2. Burleson was employed by the Hancock County Sheriff's Department. He was assigned to the investigation department. On October 15, 1999, Sheriff Peterson informed Burleson that Burleson was being transferred to the patrol division. The reason given for the transfer was because Sheriff Peterson had been informed that Burleson was an insurance risk. The risk stemmed from two separate lawsuits filed against the sheriff's department based upon actions of Burleson. The insurance company had threatened not to renew the insurance policy covering the sheriff's department. On November 1, Burleson was transferred to patrol. He filed no objection. Although Burleson never complained of the transfer until his termination, he now argues that this was a demotion and not a transfer.

¶3. On March 13, 2000, Burleson received a written statement that he was being terminated from his employment because of the insurance risk he posed. The letter also included his right to appeal and his entitlement to accumulated compensatory and vacation time. The letter was from Sheriff Garber. Sheriff Garber entered office in January of 2000 after defeating Sheriff Peterson in the

election. On March 15, 2000, Burleson requested a hearing. Burleson filed a written complaint with the Commission.

¶4. On May 2, the Commission acknowledged it was investigating the matter. The Commission conducted an investigation and hearing. On August 24, 2000, Burleson met with the Commission. It was at this time, Burleson discovered that the Commission had already met with the other parties.

¶5. In late August of 2000, a hearing was held, but was continued as the attorney that was to represent Sheriff Garber was called as a witness, resulting in Sheriff Garber's having to retain other legal counsel. The hearing was continued several times and was reconvened on January 17, 2001. Burleson asserts that cross-examination of the opposition was not allowed.

¶6. The Commission returned a decision on March 26, 2001, approving the termination of Burleson. Burleson appealed to the Hancock County Circuit Court on April 6, 2001. The circuit court judge affirmed the decision on February 22, 2002. Burleson perfected his appeal.

LEGAL ANALYSIS

¶7. The standard of review this Court is to follow in appeals from a circuit court's ruling on a case from the Civil Service Commission is set out in section 21-31-23 of the Mississippi Code Annotated. It states in part:

> However, such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission,

> was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

Miss. Code Ann. § 21-31-23 (Rev.2000).

¶8. The Mississippi Supreme Court has held that "intertwined with this question [of good faith] is whether or not there was substantial evidence before the Civil Service Commission to support its order and whether it is arbitrary, unreasonable, confiscatory, and capricious." *City of Meridian v. Hill,* 447 So.2d 641, 643 (Miss.1984). The burden is on the appellant. *Lanier v. City of Biloxi,* 749 So.2d 139, 154 (¶59) (Miss. 1999).

1. WAS HE DEMOTED IN VIOLATION OF THE CIVIL SERVICE RULES AND REGULATIONS?

¶9. The Civil Service Rules and Regulations Rule 1.3 states in part:

> No person who has been permanently appointed or inducted into civil service under the provisions of this act . . . shall be removed, suspended, demoted, or discharged, or any combination thereof, except for cause, and only upon the written accusation of the sheriff or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused and a duplicate filed with the commission.

¶10. The rule is based on part of Mississippi Code Annotated section 21-31-23. Burleson did not make his transfer an issue until March 15, 2000, when he requested a hearing regarding his termination and "demotion." The

Civil Service Rules and Regulations Rule 1.3 allows for only ten days from date of incident to request a hearing.

¶11. Burleson argues that because the Commission did not object to his raising the issue, it was properly before the Commission. The Commission issued no ruling or statement regarding the reassignment. Because Burleson failed to properly raise the issue within the required time, the Commission did not have to consider the issue.

¶12. Although the circuit court did decide that the issue was not properly before the Commission, the circuit court also discussed whether Burleson was actually demoted or reassigned. The technical definition of a demotion according to the Civil Service Rules and Regulations Rule 3.2.11 is a reduction to a class having a lower maximum rate of pay. While evidence suggests that a patrol officer does have a lower maximum rate of pay, there is no evidence that Burleson actually received a lower rate of pay.

2. WAS HE DENIED DUE PROCESS BY HIS DISCHARGE WITHOUT A PRE-TERMINATION HEARING?

¶13. The Civil Service Rules and Regulations Rule 1.3 states in part:

> In the absence of extraordinary circumstances or situations, before any such employee may be removed or discharged, he shall be given written notice of the intended termination, which notice shall state the reasons for termination and inform the employee that he has the right to respond in writing to the reasons given for termination within a reasonable time and respond orally before the sheriff. The sheriff may in his discretion, provide for a pre-termination

> hearing and examination of witnesses, and if a hearing is to be held, the notice to the employee shall also set the time and place of such hearing.

¶14. The sheriff's decision whether or not to grant a pre-termination hearing is discretionary. Burleson argues that federal law requires a pre-termination hearing for civil employees. In *Cleveland Board of Education v. Loudermill,* the court ruled that public employees must be given a pre-termination hearing. *Loudermill*, 470 U.S. 532, 542 (1985). Although the court did not require that a *full evidentiary hearing* be held prior to discharge, it did conclude that some type of informal hearing was called for. Specifically, the court found that a public employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination. *Loudermill,* 470 U.S. at 546.

¶15. The Fourteenth Amendment forbids states from depriving an individual of life, liberty or property without due process. Due process requirements are not the same in every situation. Rather, the amount of process required varies according to the circumstances of the deprivation. In *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the three factors normally weighed in determining the required amount of process are the importance of the individual interests involved, the value of specific procedural safeguards to that interest and the government interest in administrative efficiency. *Id.*

¶16. When a procedural due process claim is raised in a case, it must be evaluated using a two step process. *Nichols v. City of Jackson,* 848 F. Supp. 718, 720 (S.D. Miss.1994). "The first step requires the court to decide whether a protected life, liberty or property interest exists.

The second step is a court determination of what process is required in the situation." *Id.*

¶17. The first step of the analysis is easily dealt with. The plaintiff's property interest in his employment was created by Mississippi Code Annotated Sections 21-31-21 and 21-31-23, which provide that civil service employees cannot be discharged except for cause. As for the second step, Burleson was given the minimum due process required by an analysis of the *Mathews* factors: the written notification of termination and the actions he could take if he disagreed with the termination. We do not have to discuss the extraordinary circumstance or situation exception, as there was no due process violation.

3. HE WAS NOT GIVEN A POST-TERMINATION HEARING WITHIN TWENTY DAYS OF HIS REQUEST.

¶18. The Civil Service Rules and Regulations Rule 1.3 states in part:

> Where there are extraordinary circumstances or situations which require the immediate discharge or removal of an employee such employee may be terminated without a pre-termination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within 24 hours after the termination, and shall be given an opportunity for a hearing similar to the pre-termination hearing provided in this section within 20 days after the date of termination.

¶19. Burleson was not informed of any action the Commission was taking until forty-eight days after his written request for a post-termination hearing.

¶20. We follow the same analysis here as we did in the pre-termination hearing issue. Burleson was entitled to a certain amount of due process as a civil servant. The question is what was the minimum amount of due process which was required. The three factors, (1) the importance of the individual interests involved, (2) the value of specific procedural safeguards to that interest and (3) the government interest in administrative efficiency, must be weighed. *Mathews,* 424 U.S. at 335. While it was important to Burleson to have a quick decision by the Commission, it is also important that a proper investigation be conducted by the Commission.

¶21. It also does not appear that Burleson pressed the issue for a hearing within twenty days of his termination. We do not find in the record a petition for a writ ordering a hearing within the twenty days of request. As such, we find that Burleson failed to press the issue of having a hearing within twenty days of his request, and even if he had, the Commission is allowed the flexibility to properly investigate the matter.

4. WAS HE SUBJECTED TO DOUBLE JEOPARDY?

¶22. Burleson argues that the transfer in November of 1999 was a demotion rather than a transfer. He argues that a demotion is a reduction from one pay class to another pay class with a lower maximum rate of pay.

¶23. Burleson argues that his "demotion" was for the same reason as his termination, thus good cause was lacking for the termination. We agree with the principle that a civil servant should not be punished twice for the same incident, but we disagree that this was the case here. Since Burleson failed to press the issue of his "demotion"

until he was terminated, we can only assume that he was transferred and not demoted. Since Burleson was working for the sheriff's department, he was subject to a reclassification of his duties.

5. WAS HE DENIED DUE PROCESS BECAUSE OF THE LENGTH OF TIME FOR THE COMMISSION'S DECISION?

¶24. Burleson argues that because it took over a year for the Commission to reach a decision, his due process rights were violated. Some of the delays were agreed to by Burleson's attorney. As stated earlier, the Commission is afforded the opportunity to conduct a thorough investigation and make a well-informed decision. We do not think that the delays were a violation of due process.

6. DID THE COMMISSION HOLD MEETINGS IN VIOLATION OF ITS RULES AND THE OPEN MEETINGS ACT?

¶25. When Burleson met with the Commission for the first time in August of 2000, he was informed that the Commission had already met with Sheriff Garber, Ronald Cuevas, and Gerald Gex. Burleson was not given notice of the meetings. When Burleson and thee [sic] other parties met for the hearing, Burleson was not given an opportunity to cross-examine the opposition.

¶26. The Civil Service Rules and Regulations Rule 1.3 states in part:

> All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after which reasonable written notice to the accused of the time and place of

> such hearing, at which the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting defense.

¶27. Burleson also argues that the Commission violated the Open Meetings Act by meeting with the parties separately. The Open Meetings Act declares a policy that public business be performed in an open and public manner. While Burleson argues for the nullity of any action not taken in strict compliance with the Act, the supreme court has required only substantial compliance, not a nullification of the action taken. *Shipman v. North Panola Consol. Sch. Dist.*, 641 So.2d 1106, 1116 (Miss. 1994).

¶28. The Commission investigated Burleson's termination by first meeting with the parties individually. The Commission also allowed a hearing in which all parties were present and testimony was presented by both sides. While we question the investigative process of the Commission in interviewing the parties separately, we do not think that it is a violation of the Open Meetings Act because of the later hearing.

¶29. We are also skeptical of Burleson's claim of not being allowed to cross-examine witnesses. The other side also was denied the opportunity to cross-examine witnesses. But the saving point of the hearing is that both sides could put on rebuttal witnesses. There is also no mention of whether Burleson could have secured the other side's witnesses as adverse witnesses. There was also no record of Burleson seeking a writ allowing him to cross-examine witnesses.

7. WAS THE JUDGMENT OF THE COMMISSION NOT SUPPORTED BY SUBSTANTIAL EVIDENCE?

¶30. Burleson argues that the Commission lacked substantial evidence to uphold his termination. Civil Service Rules and Regulation 15.1.1 provides in part that a civil servant may be removed for any "omission or commission tending to injure the public services." Although Burleson claims that he was not a named defendant in one of the two lawsuits against the sheriff's department, testimony showed that he was the reason the sheriff's department was sued. The sheriff's department was advised that the suits could lead to a loss of insurance or an increased premium and deductible.

¶31. The decision of a commission must be based on substantial evidence. *Board of Law Enforcement Officers Standards and Training v. Butler,* 672 So.2d 1196, 1199 (Miss. 1996). Substantial evidence means evidence which is substantial, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Id.* There was substantial evidence presented to the Commission to support its decision. A loss of insurance for the sheriff's department is an injury to public services.

8. WAS THE JUDGMENT OF THE COMMISSION ARBITRARY AND CAPRICIOUS AND BEYOND THEIR AUTHORITY?

¶32. As stated above, the Commission had substantial evidence to uphold Burleson's termination. The insurance carrier had threatened to not renew the policy if something was not done about Burleson. Burleson also argues that the decision of the Commission was arbitrary and capricious. The standard is:

> [T]he orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

Dixie Greyhound Lines v. Miss. Pub. Serv. Comm'n, 190 Miss. 704, 715, 200 So. 579, 580 (1941) quoting *I.C.C. v. Union P.R.R. Company,* 222 U.S. 541, 547 (1912).

¶33. The sheriff acted in the best interest of the sheriff's department and the county. The Commission was correct in upholding the termination.

¶34. Burleson also argues that the decision of the Commission is null because the commissioners were serving beyond their appointed terms. The argument was not presented to the Commission. It was presented for the first time to the circuit court on appeal and the circuit court ruled it untimely. *Tbuart v. Johnston,* 656 So.2d 318, 321 (Miss.1995). We agree. Although Burleson is precluded from raising this issue on appeal, public officials can serve after the expiration of their term until they are replaced.

Andrews v. State, 69 Miss. 740, 746, 13 So. 853, 854 (1892).

9. DID THE COMMISSION FAIL TO SET FORTH ANY FINDINGS OF FACTS OR CONCLUSIONS OF LAW?

¶35. Burleson also argues that the Commission's order failed to set forth any findings of fact or conclusions of law. The order stated only that Burleson was terminated for "good cause" and not for any political or religious reasons. We entered an order mandating the Commission to prepare proper findings of fact and conclusions of law.

¶36. The Commission complied and entered an amended order that found as fact that Burleson's conduct in his official capacity, more particularly in two incidents that ultimately led to suits being brought against the sheriff's department, constituted inattention to duty and incompetence. The Commission further found as fact that the continued employment of Burleson by the department raised a substantial risk that the department would be unable to renew its existing liability insurance coverage, which would have the potential to substantially hamper the department in the performance of its duties. We conclude that there was substantial evidence in the record to support these findings of fact. We also find that the findings of fact were sufficient, as a matter of law, to constitute grounds for Burleson's discharge. This supplemental order therefore renders Burleson's original contention moot.

CONCLUSION

¶37. While the Commission may have made some mistakes, it is important to remember that the Commission is

an administrative law agency composed of persons not always well versed in the law. The Commission had to make a hard decision, whether to sacrifice insurance coverage for the sheriff's department thereby putting all citizens of that county at risk or to uphold the termination of Burleson. The Commission may have made some mistakes, but its decision followed a lengthy investigation and information gathering process. The circuit court upheld the Commission's decision. We uphold the circuit court's decision.

¶38. THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES, THOMAS, LEE, AND CHANDLER, JJ., CONCUR. KING, P.J., AND IRVING, J., CONCUR IN RESULT ONLY. SOUTHWICK, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, C.J., AND GRIFFIS, J.

SOUTHWICK, P.J., DISSENTING:

¶39. With respect for the majority, I find that more process was due to Burleson before he was terminated. The Court points out that the United States Supreme Court has held that a public employee, protected in his job by the limitation on dismissal only for good cause, must have a pre-termination opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985). Though citing that case, the majority then does not apply it.

¶40. Once a life, liberty or property interest is identified, then any deprivation of that interest must be through such procedures as are needed to provide fairness in the context of the deprivation. It is certainly true that the process that

is constitutionally required depends on various considerations. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). The problem, here, though, is that the context has already been addressed by the Supreme Court. The weighing of factors required by *Eldridge* in the context of for-cause termination from public employment was performed by the Supreme Court. *Loudermill,* 470 U.S. at 543-45. The conclusion was that a pretermination hearing was needed:

> The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

Loudermill, 470 U.S. 532, 544-45. The Court followed these observations with the conclusion "that the pretermination 'hearing,' though necessary, need not be elaborate. We have pointed out that '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.'" *Id.* at 545.

¶41. Since Burleson was not given an opportunity to be heard prior to his termination, I would reverse and remand.

McMILLIN, C.J., AND GRIFFIS, J., JOIN THIS SEPARATE WRITTEN OPINION.

APPENDIX B

Serial: 105170

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2002-CC-00411-COA

GEORGE E. BURLESON ***Appellant***

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON ***Appellee***

ORDER

(Filed Jun 04, 2003)

This matter came before the Court on appeal and the Court on its own motion finds that it is necessary to remand the case to the Hancock County Sheriff's Department Civil Service Commission for thirty days for the limited purpose of requiring the Commission to make written findings of fact in accordance with Miss. Code Ann. § 21-31-23 (Rev. 2001). The statute provides that "[t]he findings of the commission shall be certified in writing to the appointing power. . . . " *See Bowie v. City of Jackson Police Department*, 816 So. 2d 1012 (¶ 21) (Miss. Ct. App. 2002), citing *City of Jackson v. Froshour*, 530 So.2d 1348, 1355 (Miss. 1988) (holding that the "Commission is under a duty to set forth with sufficient clarity and specificity the reason it is upholding the action taken by the city. . . . "). The Court finds that no specific findings of

fact were made by the Commission and the [sic] such findings are necessary for the appellate review of this case.

THEREFORE IT IS ORDERED that on the Court's own motion the case is remanded to the Hancock County Sheriff's Department Civil Service Commission for the limited purpose of requiring the Commission to make written findings of fact pursuant to Miss. Code Ann. § 21-31-23 (Rev. 2001) and to certify these findings to the Court within thirty (30) days from the date of the entry of this order.

SO ORDERED, this the 3rd day of June, 2003.

/s/ William H. Myers
WILLIAM H. MYERS,
JUDGE

APPENDIX C

STATE OF MISSISSIPPI
COUNTY OF HANCOCK

HANCOCK COUNTY SHERIFF'S DEPARTMENT
CIVIL SERVICE COMMISSION

IN RE: GEORGE E. BURLESON

FINDINGS OF FACT

Pursuant to the Order and Mandate of the Court of Appeals entered in Cause No. 2002-CC-00411-COA, an Appeal by George E. Burleson, Appellant, Hancock County Sheriff's Department Civil Service Commission et al, Appelees [sic] for the limited purpose of the Commission making Findings of Fact, the Commission, by and through its duly appointed Commissioners, William A. Tate, Honorable Ann Williamson and Raquel Lafontaine, does hereby certify the following facts, to-wit:

I.

The transfer of George E. Burleson from Investigations to Patrol by Sheriff Peterson was not a demotion, as it did not involve a change in pay, grade or benefits. Further, that George E. Burleson failed to appeal same within ten (10) days of the disciplinary action.

II.

The actions by George E. Burleson in the Poole and Benvenutti cases (two citizens arrested by George E. Burleson) and resulting lawsuits against Hancock County and the Sheriff's Department, placed the Sheriff's Department and the County in danger of immediate injury to

the County by losing its insurance if George E. Burleson were to continue in his employment, as testified by both Sheriff Steve Garber and County Attorney, Honorable Gerald Gex.

III.

The Commission finds that no pre-termination hearing was required due to the danger of immediate harm to the County and the Sheriff's Department.

IV.

The Commission finds that George E. Burleson showed inattention to duty, incompetence, and discourteous treatment of the public, as well. Further, the written notice of termination by Sheriff Steve Garber on March 13, 2000, included the specific reason for his termination.

V.

George E. Burleson was afforded a full opportunity at the hearing and that his legal counsel vigorously defended the charges. A full review of all documents and testimony was made by the Commission.

VI.

Both former Sheriff Peterson and former Chief Administrator Gerald Necaise testified that George E. Burleson was provided all training and counseling regarding the requirements of his job, and that George E. Burleson was provided a copy of the Civil Service Rules (signed

for in 1990), Department policies and procedures and his job description, as well.

VII.

The Commission finds that the termination of George E. Burleson was made in good faith and for cause, was supported by substantial evidence and was not made for political or religious reasons (Note: George E. Burleson testified that he campaigned for Sheriff Steve Garber).

SO ENTERED on this the 2nd day of July, 2003.

/s/ William A. Tate
WILLIAM A. TATE
Commission Chairman

/s/ Ann Arras Williamson
HONORABLE
ANN WILLIAMSON
Commission Vice-Chairman

/s/ R. LaFontaine
RAQUEL LAFONTAINE
Commissioner

APPENDIX D

IN THE CIRCUIT COURT OF
HANCOCK COUNTY, MISSISSIPPI

GEORGE E. BURLESON — APPELLANT

VERSUS — NO. A2301-01-0160

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON — APPELLEES

ORDER

(Filed Feb. 22, 2002)

George E. Burleson appeals from the termination of his employment with the Hancock County Sheriff's Department [HCSD] by the County's Civil Service Commission [Commission]. On appeal Burleson presents ten issues which he contends require reversal of the Commission's decision. After carefully reviewing the record and the briefs and authorities submitted by the parties, hearing oral argument, and studying applicable law, the Court finds as follows:

George Burleson began working with HCSD in June 1980 as a dispatcher and jailer, and over the years advanced to ranks of sergeant, staff sergeant, lieutenant and captain. After attaining the rank of captain, he served as an investigator until October 15, 1999, when then Sheriff

Ronald Peterson[1] advised him that effective November 1, 1999, Burleson was reassigned to the patrol division. Burleson testified that in March 2000, Sheriff Steve Garber terminated his employment, telling him he was an insurance risk.

The record contains a March 13, 2000 letter from Sheriff Garber advising Burleson that after discussing the matter with the Attorney for the Hancock County Board of Supervisors, he "had no other choice but to advise [Burleson] that effective March 13, 2000, [Burleson's] services will no longer [sic] needed by the Sheriff's Office. "The letter informs Burleson of his right to appeal this decision to the Civil Service Commission and of his entitlement to his accumulated comp time and vacation, and concludes:

> Due to the number of cases now pending in which you are involved and the cases the office has been involved over the years, there is great concern as to the availability of insurance for my office.

The record evidence is undisputed that at the time Sheriff Garber discharged Burleson, individuals named Benvenutti and Poole had lawsuits pending against Hancock County and its Sheriff because of Burleson's involvement in having these citizens arrested.[2] It is further undisputed that Burleson's actions and the resulting lawsuits were adversely affecting the ability of the

---

[1] In his bid for re-election in 1999, Sheriff Peterson was defeated by present Sheriff Steve Garber.

[2] As soon as he learned of the arrests, Sheriff Peterson released Poole from custody in Hancock County and, secured the release of Benvenutti through Florida authorities where she was arrested because Burleson had put her name into the National Crime Information Center nationwide computer.

HCSD to get and/or maintain liability insurance. The insurer was considering non-renewal of the HCSD policy due to excessive exposure/multiple claims involving Burleson, or excluding Burleson from the policy's coverage, and the insurer informed Sheriff Garber that if it renewed the policy it would be with an accelerated deductible or significant premium increase. According to former Sheriff Peterson, Burleson's actions in the Benvenutti and Poole cases prompted him to transfer Burleson from investigations to patrol in November 1999. Sheriff Garber testified he decided to terminate Burleson based on consideration of the insurance problems, potential liability and lawsuits against the county and the best interest of the county. On March 15, 2000, Burleson filed a request for hearing before the Civil Service Commission regarding his termination, as well as the "demotion" by Sheriff Peterson which had occurred six months earlier.

The *Civil Service Rules and Regulations for Hancock County Sheriff's Department* provide that judicial review of Commission decisions is "confined to the determination of whether the . . . discharge . . . was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds." Civil Service hearings, like other administrative proceedings, are reviewed on a substantial evidence standard. *Ladnier v. City of Biloxi*, 749 So.2d 139, 147 (Miss. 1999)]; *City of Jackson v. Froshour*, 530 So.2d 1348, 1355 (Miss. 1988). Review is upon the record made before the Commission, and the Court is not to disturb a decision which is supported by substantial evidence. It is with that standard in mind that the Court addresses Burleson's complaints.

Burleson's first complaint is that his November 1999 "demotion" and transfer from investigations to patrol violated the *Civil Service Rules and Regulations for*

Hancock County Sheriff's Department. The record before this Court contains no timely written request by Burleson for investigation by the Civil Service Commission of the alleged demotion. Rule 1.3 of the *Civil Service Rules and Regulations* requires that a request for Commission investigation of a demotion be filed with the Commission within 10 days from the time of such disciplinary action. See also, Ch. 802, Local and Private Laws 1990, Section 11 [written demand for Civil Service Commission investigation must be filed within 10 days of action of which complaint is made]. The only request for Commission investigation in the record is the one dated March 15, 2000, which calls into question whether this Court has jurisdiction to review the alleged demotion at all. However, in the event that this issue be deemed properly before the Court, the Court finds as a matter of law that Burleson's 1999 transfer from investigations to patrol was not a demotion as defined under the *Civil Service Rules and Regulations.* A demotion is "a reduction to a class having a lower maximum rate of pay." Rule 3.2.11. No evidence contradicts the testimony of former Sheriff Peterson that the transfer *did not* affect Burleson's pay, that it was "just an alternative to termination." There is no merit to this issue. Since there was no demotion, there is likewise no merit to Burleson's third issue [whether demotion and firing for the same reason violated Burleson's due process rights] and his ninth issue on appeal [whether the Commission had the power to discharge him for the same reason for which he was previously demoted].

The second issue for review is whether Burleson's discharge without a pre-termination and/or post-termination hearing violated his rights under the *Civil Service Rules and Regulations.* Rule 1.3 provides: "The

sheriff may, *in his discretion*, provide for a pretermination hearing . . . and *if* a pretermination hearing is to be held. . . . " Clearly, the rules do not mandate a pretermination hearing, and had there been one, Burleson could not have denied that the insurer's reluctance to renew the HCSD policy because of the pending lawsuits. In addition, as to the right to a post-termination hearing, the Court finds the hearings conducted by the Commission afforded Burleson the rights and protections to which he was entitled under the Civil Service system. The Court therefore finds no merit to this issue.

Burleson's fourth issue is whether the Commission's "waiting over a year to reach a decision" violated his due process rights. Neither the *Civil Service Rules and Regulations* nor their statutory source compel a decision by the Commission within a specified time. The record establishes that on August 24, 2000, Burleson's case was set for hearing before the Commission. On August 31, 2000, the Commission received the testimony of the attorney for Hancock County Board of Supervisors Gerald Gex and a copy of the Poole lawsuit. Sheriff Garber was present, however he asked that he be allowed to get an attorney before proceeding further, and the Commission continued the case. Burleson's counsel did not object; he responded "that's very fair. . . . " The hearing was rescheduled from November and December dates, and ultimately concluded on January 17, 2001. The record reflects no objection by Burleson to the Commission's resetting the matter. On January 17, 2001, the Commission heard the testimony of former Sheriff Peterson, Chief Administrator Ronnie Cuevas, Sheriff Steve Garber, Gerald Necaise, and George Burleson, and received into evidence two volumes of exhibits. At the conclusion of the hearing, the Commission

requested that the parties submit proposed findings of fact and conclusions of law. Counsel for Sheriff Garber and Burleson complied with this request on January 31, 2001 and February 9, 2001, respectively. On March 26, 2001, the Commission rendered its decision. The record supports a finding of good cause for the initial continuance of the hearing in August 2000, and shows no objection by Burleson to any continuance or rescheduling of the hearings. There is no presumption that rights of constitutional magnitude have been infringed by the mere passage of time. Burleson bears the burden on appeal of showing, by record evidence, that such a violation occurred. The Court finds Burleson has failed to meet his burden on this issue.

The fifth and sixth issues Burleson presents for review are so closely intertwined that the [sic] will address them as one. Burleson complains, respectively, that the Commission violated the *Civil Service Rules and Regulations* by "conducting investigations, outside the forum of a public hearing and without notification to Captain Burleson" and that the Commission violated the Open Meetings Act by "meeting in private, without notice to the public or Deputy Burleson. . . . " Under the *Civil Service Rules and Regulations*, "All investigations made by the commission . . . shall be by public hearing, after reasonable written notice to the accused of the time and place of such hearing." The Commission's minutes state that on May 2, 2000, attorney Gerald Gex "explained to the Commission liability cases pertaining to George Burleson . . . ," and that the Commission requested former Chief Administrator Gerald Necaise "to give a summary as to George Burleson's actions leading to his lateral transfer and dismissal." However, these same individuals were subsequently called and testified in duly noticed, formal public hearings with

Burleson present and represented by counsel. That there was no attempt at subterfuge by the Commission is obvious from the fact that it recorded its actions in its official minutes. Burleson has presented no evidence that the Commission's decision was based upon anything more than was established in the public hearings in his case. Therefore, the Court finds that even if the Commission erred in making its initial contact with Gex and Necaise as it did, the error does not require reversal of the decision.

The seventh issue for review is whether substantial evidence supports the Commission's decision that "Burleson, because of two pending lawsuits allegedly involving him, was an 'insurance risk' creating 'extraordinary circumstances' requiring his immediate discharge." In light of the undeniable record evidence of the two lawsuits, both of which arose out of Burleson's conduct, and the undisputed evidence that the insurer was threatening non-renewal of the HCSD policy due to the excessive liability exposure resulting from Burleson's conduct, the Court finds substantial record evidence supports the Commission's decision.

Burleson's eighth issue for review challenges the Commission's decision as arbitrary and capricious in his eighth assignment of error. The Commission's Conduct and decision in this case do not meet the definition of arbitrary and capricious as stated in *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992):

> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone, – absolute in power, tyrannical, despotic, non-rational, – implying

> either a lack of understanding of or a disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.

In his tenth and final issue on appeal, Burleson challenges the Commission's order on grounds that the Commissioners were serving beyond their statutorily limited appointed terms of office. The Court finds this issue is not the proper subject of judicial review as there is no evidence in the record made below that the issue was presented to the Commission. It is therefore,

ORDERED AND ADJUDGED, the decision of the Hancock County Civil Service Commission is affirmed, this the 21st day of FEB., 2002.

/s/ Robert H. Walker
ROBERT H. WALKER
CIRCUIT JUDGE

APPENDIX E

Serial: 113250

IN THE SUPREME COURT OF MISSISSIPPI

No. 2002-CT-00411-SCT

GEORGE E. BURLESON

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON

ORDER

(Filed May 6, 2004)

This matter came before the Court on the petition for writ of certiorari filed by George E. Burleson. After consideration, the Court finds that the petition should be denied.

IT IS THEREFORE ORDERED that the petition for writ of certiorari is hereby denied.

SO ORDERED, this the 30 day of April, 2004.

/s/ James W. Smith, Jr.
JAMES W. SMITH, JR.,
CHIEF JUSTICE
FOR THE COURT

TO DENY: SMITH, C.J., WALLER AND COBB, P.JJ., EASLEY, CARLSON, GRAVES, DICKINSON AND RANDOLPH, JJ.

NOT PARTICIPATING: DIAZ, J.

APPENDIX F

U.S. Constitution: Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution: Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of

the male inhabitants of such state, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizen's shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

Miss. Code Ann. § **25-41-1** (2004)

§ 25-41-1. Legislative declaration

It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

---

28 USCS § 1257 (2004)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

---

28 USCS § 2104 (2004)

§ 2104. Reviews of State court decisions

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.

APPENDIX H

CHAPTER NO. 802
HOUSE BILL NUMBER 133

AN ACT TO AUTHORIZE THE BOARD OF SUPERVISORS OF HANCOCK COUNTY TO CREATE A CIVIL SERVICE COMMISSION FOR THE HANCOCK COUNTY SHERIFF'S DEPARTMENT; TO PROVIDE FOR THE APPOINTMENT OF MEMBERS OF THE COMMISSION; TO SPECIFY THE DUTIES OF THE COMMISSION; TO SPECIFY THE PERSONS COVERED BY THE CIVIL SERVICE SYSTEM; TO PRESCRIBE THE PROCEDURE FOR APPOINTMENTS AND LAYOFFS OF PERSONS COVERED BY THE CIVIL SERVICE SYSTEM; TO PRESCRIBE THE PROCEDURE FOR REMOVAL, SUSPENSION, DEMOTION AND DISCHARGE OF PERSONS COVERED BY THE CIVIL SERVICE SYSTEM; AND FOR RELATED PURPOSES.

Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. The Board of Supervisors of Hancock County is authorized to create by ordinance a civil service commission for the Hancock County Sheriff's Department.

SECTION 2. (1) The members of the civil service commission shall be appointed by the Sheriff of Hancock County, with a majority of the Board of Supervisors of Hancock County voting therefor; shall be three (3) in number; and shall be paid a sum not to exceed One Hundred Dollars ($100.00) per month to compensate them for their services. No person shall be appointed a member of such commission who is not a citizen of the United States and Hancock County, and who has not lived in Hancock County for at least five (5) years immediately preceding such appointment. Terms of office for each members [sic]

shall be for six (6) years, except that the first three (3) members shall be appointed for staggered terms as follows: One (1) shall serve a period of two (2) years, one (1) shall serve a period of four (4) years and one (1) shall serve a period of six (6) years.

(2) Any member of the commission may be removed from office for incompetency, incompatability [sic], dereliction of duty, or other good cause, by the Board of Supervisors of Hancock County. However, no member shall be removed until charges have been preferred in writing and a full hearing had before the board of supervisors. Any member being so removed shall have the right of appeal to the circuit court any time within thirty (30) days thereafter, and may demand a jury trial. Such trial shall be confined to the determination of whether the order of removal made by the board of supervisors was or was not made in good faith and for cause.

(3) Two (2) members shall constitute a quorum and the votes of any two (2) members shall constitute a majority and be sufficient for the decision of all matters and transactions.

SECTION 3. (1) Immediately after the appointment of the civil service commission, the commission shall organize by electing one (1) of its members chairman. The commission shall hold regular meetings at least once each month, and such additional meetings as may be required for the proper discharge of its duties.

(2) The commission shall appoint a secretary and a board of examiners, which board shall consist of the sheriff and two (2) members appointed by the commission, all of whom shall serve without compensation. The secretary shall keep the records and preserve all reports made to the

commission, and also a record of all examinations held under the direction of the board of examiners, and perform such other duties as the commission may prescribe. The members of the board and the secretary are subject to suspension and discharge in the same manner as the commissioners.

SECTION 4. It shall be the duty of the civil service commission to make suitable rules and regulations not inconsistent with the provisions of this act. Such rules and regulations shall provide in detail the manner of conducting examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions and discharges, and may also provide for any other matter connected with the general subject of personal administration which may be considered desirable to further carry out the general purposes of this act. It shall have the power to conduct investigations, and make reports on all matters touching the enforcement and effect of the provisions of this act and the rules and regulations prescribed hereunder. The commission shall have the power to investigate all complaints, which must be reduced to writing, and to subpoena witnesses, administer oaths and conduct hearings.

SECTION 5. The Board of Supervisors of Hancock County shall provide the commission with suitable and convenient rooms and accommodations, and shall cause the same to be furnished, heated and lighted and supplied with all office supplies and equipment necessary to carry on the business of the commission, and shall provide such clerical assistance as may be necessary, all of which is to be commensurate with the number of persons in the Hancock County Sheriff's Department coming within the purview of this act. The failure upon the part of the board

of supervisors to do so shall be considered a violation of this section and shall be punishable as such.

SECTION 6. The provisions of this act shall include all full-time paid employees of the Hancock County Sheriff's Department except the sheriff and chief deputy. All appointments to and promotions in the sheriff's department shall be made solely on merit, efficiency and fitness, which may be ascertained by open competitive examination and impartial investigation. No person shall be reinstated in, or transferred, suspended, or discharged from any place, position or employment contrary to the provisions of this act. All incumbents and future appointees shall be subject to civil service.

SECTION 7. Any applicant for any position in the Hancock County Sheriff's Department which is under civil service must be a citizen of the United States and an elector of Hancock County, and must meet only such bona fide occupational residency requirements as may be determined by the civil service commission.

SECTION 8. For the benefit of the public service and to prevent delay, injury or interruption therein by reason of the enactment of this act, all persons holding a position in the Hancock County Sheriff's Department, except the sheriff and chief deputy, who have served continuously in such positions for a period of at least the preceding six (6) months are eligible for permanent appointment under civil service to the offices, positions, or employments which they then hold, respectively, without examination or other act on their part, and not on probation, and every such person is automatically adopted and inducted permanently into civil service, into such office, place, position or employment which such person then holds as completely and

effectually to all intents and purposes as if such person had been permanently appointed thereto under civil service after examination and investigation. However, those persons who have previously left their positions to participate in the Armed Forces of the United States shall have preference in reemployment and enjoy the rights and privileges of this act as if their services had not been terminated.

SECTION 9. The civil service commission shall keep a list of all members of the Hancock County Sheriff's Department, and formulate methods of determining the relative qualifications of persons seeking employment in the sheriff's department, and give preference to those having the best qualifications. The commission shall provide that persons laid off because of curtailment of expenditures, reduction in force, and all like causes, shall be the last persons, including probationers, that have been appointed to the sheriff's department, until such reductions necessary shall have been accomplished. However, if the sheriff's department again is increased in numbers, those suspended shall be reinstated before any new appointments shall be made.

SECTION 10. The tenure of everyone holding an office, place, position or employment under the provisions of this act shall be only during good behavior. Any such person may be removed or discharged, suspended without pay, demoted or reduced in rank, or deprived of vacation privileges or other special privileges, or any combination thereof, for any of the following reasons:

Incompetency, inefficiency, or inattention of duty; dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow

employee, or any other act of omission or commission tending to injure the public service.

SECTION 11. No person who has been permanently appointed or inducted into civil service under the provisions of this act, except for such persons as may be employed to fill a vacancy caused by the absence of an employee of the sheriff's department while in service as a member of the Armed Forces of the United States, shall be removed, suspended, demoted or discharged, or any combination thereof, except for cause, and only upon the written accusation of the sheriff or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission.

In the absence of extraordinary circumstances or situations, before any such employee may be removed or discharged, he shall be given written notice of the intended termination, which notice shall state the reasons for termination and inform the employee that he has the right to respond in writing to the reasons given for termination within a reasonable time and respond orally before the sheriff. The sheriff may, in his discretion, provide for a pretermination hearing and examination of witnesses, and if a hearing is to be held, the notice to the employee shall also set the time and place of such hearing. A duplicate of such notice shall be filed with the commission. After the employee has responded or has failed to respond within a reasonable time, the sheriff shall determine the appropriate disciplinary action, and shall notify the employee of his decision in writing at the earliest practicable date.

Where there are extraordinary circumstances or situations which require the immediate discharge or

removal of an employee, such employee may be terminated without a pretermination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within twenty-four (24) hours after the termination, and shall be given an opportunity for a hearing similar to the pretermination hearing provided in this section within twenty (20) days after the date of termination. For the purposes of this section, extraordinary situations or circumstances include, but are not limited to, circumstances where retention of the employee would result in damage to property of the county or the sheriff's department, would be detrimental to the interest of the county government or the sheriff's department, or would result in injury to the employee, to a fellow employee or to the general public.

Any person so removed, suspended, demoted, discharged or combination thereof may, within ten (10) days from the time of such disciplinary action, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such disciplinary action was or was not made for political or religious reasons and was or was not made in good faith for cause. After such investigation the commission may, if in its estimation the evidence is conclusive, affirm the disciplinary action, or if it shall find that the disciplinary action was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position, or employment from which such person was removed, suspended, demoted, discharged or combination thereof, which reinstatement shall, if the commission so provides in its

discretion, be retroactive, and entitle such person to pay or compensation from the time of such disciplinary action. The commission upon such investigation may, in lieu of affirming the disciplinary action, modify the order of removal, suspension, demotion, discharge or combination thereof by directing a suspension without pay for a given period and subsequent restoration of duty, or by directing a demotion in classification, grade or pay, or by any combination thereof. The findings of the commission shall be certified in writing to the sheriff, and shall be forthwith enforced by the sheriff.

All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after reasonable written notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. The findings of the commission shall be conclusive and binding unless either the accused or the sheriff, within thirty (30) days from the date of the entry of such judgment or order on the minutes of the commission and notification to the accused and the sheriff appeals to the Circuit Court of Hancock County. Any appeal of the judgment or order of the commission shall not act as a supersedeas of such judgment or order, but the judgment or order shall remain in effect pending a final determination of the matter on appeal. Such appeal shall be taken by serving the commission and the appellee, within thirty (30) days after the entry of such judgment or order, a written notice of appeal stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order

be filed by the commission with such court. The commission shall, within thirty (30) days after the filing of such notice, make, certify and file such transcript with such court. The circuit court shall thereupon proceed to hear and determine such appeal. However, such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

SECTION 12. The fixing of the rate of compensation of every employee in the Hancock County Sheriff's Department shall remain vested with the Sheriff of Hancock County, and nothing contained in this act shall infringe upon the power and authority of the sheriff to so fix the rate of compensation.

SECTION 13. No person holding any office, place, position or employment in the Hancock County Sheriff's Department which is subject to civil service is under any obligation to contribute to any political fund or to render any political service to any person or party whatsoever, and no person shall be removed, reduced in grade or salary, or otherwise prejudiced for refusing so to do. No public officer, whether elected or appointed, shall discharge, promote, demote or in any manner change the official rank, employment or compensation of any person in the sheriff's department under civil service, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or service or any other valuable thing for any political purpose.

If any person holding any office, place, position or employment in the sheriff's department which is subject

to civil service actively participate in political activity in any primary or election in Hancock County, it shall be deemed cause for removal

SECTION 14. This act shall take effect and be in force from and after its passage.

Approved: March 20, 1990

APPENDIX I

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION

[SEAL]

P.O. Box 262 – Bay St. Louis, MS 39520
(601) 467-5101

Personal & Confidential

March 26, 2001

Honorable James Bailey Halliday
Attorney at Law
P.O. Box 549
Gulfport, MS 39502

RE: George E. Burleson
Appeal of Demotion and Discharge

Dear Mr. Halliday:

After reviewing all testimony and documentary evidence in the above referenced cause, the Civil Service Commission of the Hancock County Sheriff's Office does hereby uphold the termination of George E. Burleson and finds that said termination was not made for political or religious reasons but was made in good faith for cause.

Your client has a right to appeal this decision to the Hancock County Circuit Court, but said appeal must be filed within 30 days of the date hereof.

Sincerely,

Civil Service Commission
for Hancock County Sheriff's
Office

/s/ David A. Garcia
David A. Garcia, President

/s/ William A. Tate
William A. Tate,
Vice President

/s/ Ann Arras Williamson
Ann Arras Williamson,
Commissioner

cc: Mr. George E. Burleson
Hon. W. Ross Capps/Albert Necaise
Sheriff Steve Garber

bcc: Civil Service File

APPENDIX J

Hancock County Sheriff's Department
H. Steve Garber – Sheriff

[LOGO]

122 1/2 Court Street
Bay Saint Louis, MS 39520
(228) 467-5101

March 13, 2000

Mr. George Burleson

Dear Mr. Burleson,

I have been in contact with the Attorney for the Hancock County Board of Supervisors, and as a result of our discussions I have no other choice but to advise you that effective March 13, 2000 your services will no longer be needed by the Sheriff's Office.

You have the right to appeal my decision to the Civil Service Commission and on your termination, you will be entitled to your accumulated comp time and vacation time.

Due to the number of cases now pending in which you are involved and the cases the office has been involved over the years, there is great concern as to the availability of insurance for my office.

Respectfully yours,

/s/ Steve Garber
Steve Garber
Sheriff

SG\tg

No. 04-180

Supreme Court, U.S
FILED
NOV 1 2 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GEORGE E. BURLESON,

Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The Appeals Court Of The State Of Mississippi

BRIEF IN OPPOSITION TO CERTIORARI

Of Counsel:

ALBERT NECAISE
2510 16th Street
P.O. Box 717
Gulfport, MS 39502-0717
(228) 863-1990

LUTHER T. MUNFORD
Counsel of Record
PHELPS DUNBAR LLP
111 E. Capitol Street,
Ste. 600
P.O. Box 23066
Jackson, MS 39225
(601) 352-2300

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. When an insurer threatens to increase renewal costs unless the County fires a sheriff's deputy, who has in one year instigated or executed two false arrests that resulted in suits against the county, does due process demand that the sheriff afford the deputy who refuses to discuss the discharge a pre-termination hearing?

II. Where a discharged sheriff's deputy agrees to continue his post-termination hearing, may he complain that the hearing was not held in a timely fashion?

III. Where the state courts have held that the deputy was only disciplined once, should this court review an allegation that state law was violated by disciplining him twice?

IV. May a deputy who was allowed cross-examination at a first hearing and who did not object to the absence of cross-examination at a second hearing where he testified, claim the absence of cross-examination denied him due process, where he also does not dispute the facts upon which the discharge was based?

V. Is a federal question raised where some of the Civil Service Commission's investigation was allegedly *ex parte* in violation of state law but substantial on-the-record evidence supported its findings?

VI. Is a federal question raised where it is alleged that the terms of Civil Service Commission members had expired when they rendered their decision, a claim not raised before the Commission and a claim that ignores the "de facto" authority of state officers whose authority is later challenged?

QUESTIONS PRESENTED – Continued

VII. Where a statute sets out grounds for discharge, i.e., "inattention to duty, incompetence and discourteous treatment of the public," can an employee claim he did not have notice that the Commission, when ordered to make additional findings, would conclude that his involvement in the false arrests met that standard?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	8
I. The petitioner deputy received all the process that was due him under the due process clause	8
II. A lower state court's alleged misapplication of its own law does not present a federal question, nor, does an alleged confusion within the Mississippi court system on a federal question merit certiorari	10
III. Neither the petitioner nor the amicus have identified any issue of exceptional importance	12
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Burleson v. Hancock County Sheriff's Department Civil Service Comm'n, 872 So.2d 43 (Miss. Ct. App. 2003) 1, 2, 4, 5, 10, 12

Burleson v. Hancock County Sheriff's Department Civil Service Comm'n, 873 So.2d 1032 (2004) 2

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 8, 13

Dixon v. Love, 431 U.S. 105 (1977) 8

Garraghty v. Commissioner of Va. Dep't of Corrections, 52 F.3d 1274 (4th Cir. 1995) 10, 13

Gilbert v. Homar, 520 U.S. 924 (1997) 9

Matthews v. Eldridge, 424 U.S. 335 (1976) 8

Mitchell v. Frankhauser, 375 F.3d 477 (6th Cir. 2004) 13

Mount Healthy v. Doyle, 429 U.S. 274 (1977) 8

STATUTES

Miss. Code Ann. § 25-1-37 12

Miss. Code Ann. § 25-41-7 11

INTRODUCTION

Because of a series of multi-million dollar verdicts that began in 1995, Mississippi has suffered a crisis in the availability of liability insurance, particularly for physicians and, to a lesser extent, for public entities whom juries are tempted to view as "deep pockets."

This case arises out of the difficulty Hancock County had in obtaining liability insurance in 2000. Citizens filed lawsuits for false arrest after two separate 1999 incidents involving Petitioner, former Sheriff's Deputy George E. Burleson. After the first suit was filed, the deputy was moved from a job that included investigation to a patrolman's job. *Burleson v. Hancock County Sheriff's Department Civil Service Comm'n*, 872 So.2d 43, 47 (Miss. Ct. App. 2003); Pet. App. 3.

Then another suit was filed. The County's liability insurer said that, if the petitioner deputy was not fired, it would substantially increase the deductible because, unlike any other member of the sheriff's department, he had been the cause of two suits in a one-year time frame. 5:21.[1] The sheriff consulted with the county attorney. He handed the deputy a discharge letter and offered to discuss it with him, but the deputy just walked out. 5:62. The state Civil Service Commission found, and the record before it supported, that the discharge was in good faith and for cause. The deputy does not deny that he was involved in the incidents nor does he deny that the insurer made the demand.

---

[1] The Mississippi Supreme Court record is cited here as "volume:page."

Under these circumstances, the process that Hancock County gave him was more than sufficient to protect his right to due process. Even if that were not the case, this case presents no issue worthy of certiorari. The deputy mostly complains that the Mississippi Court of Appeals did not follow the state law decisions of the Mississippi Supreme Court or Mississippi regulatory law. That does not present a federal question. And on the facts of this case the federal questions are not substantial ones – for example, the petitioner deputy never objected to the inability of the parties at a hearing to cross-examine witnesses and did not raise the issue until his second appearance at the Mississippi Court of Appeals.

STATEMENT OF THE CASE

1. Proceedings and disposition in the lower courts.

The exact posture in which this case arises is as an appeal from the Hancock County Civil Service Commission, which found that the petitioner deputy was terminated "in good faith and for cause." Pet. App. 23. The Circuit Court of Hancock County, acting as an appellate court, found that substantial evidence supported the Civil Service Commission decision.

Then a second appellate court, the Mississippi Court of Appeals, remanded the case to the Civil Service Commission with a request that it make factual findings. It did so. Pet. App. 20-23. The case went back to the Court of Appeals, which affirmed the Commission's decision. *Burleson, supra*; Pet. App. 1-17. The Mississippi Supreme Court denied review. *Burleson v. Hancock County Sheriff's*

Department Civil Service Comm'n, 873 So.2d 1032 (Miss. 2004); Pet. App. 31.

The Petitioner's statement of proceedings is generally correct insofar as it actually discusses proceedings. This Court should, however, disregard the invective the deputy and his supporting policemen's union direct both at those who supervise law enforcement officers, and at citizens who exercise their constitutional rights to sue deputies or police officers who injure them.

The statement is incorrect, however, with respect to its discussion of the cross-examination issue. The Civil Service Commission held two hearings where witnesses testified. At the first hearing, the county attorney testified about his conversations with the insurer and the sheriff who fired the deputy. The deputy's counsel, retained for him by the Southern States Policemen's Benevolent Association, cross-examined the attorney at length on such subjects as the likelihood that damages for false imprisonment might be no more than $5.75 per hour. 6:29. *See* 6:21-42.

At the second hearing, where the deputy in 2001 testified along with others, the Commission chairman announced that there would be no cross-examination. The deputy's counsel objected to the testimony of a witness not listed in pre-hearing disclosures, but did not object to the lack of cross-examination and never asked to cross-examine any of the witnesses at the hearing. 5:17. In fact, as late as the Brief of Appellant Captain George E. Burleson filed in the Mississippi appellate courts on Oct. 23, 2002, a year after the hearing, the failure to allow cross-examination was not included in the deputy's list of 20 issues.

The issue made its way into the case only when the deputy appeared two years later in the Court of Appeals after the remand to the Civil Service Commission. Even if this Court wanted to consider the cross-examination issue, there is no record here to support such a consideration.

2. Statement of facts.

The respondents dispute all statements of "fact" in the Petition which are not supported by the Appendix to the Petition. Of the five statements of fact the petitioner deputy lists by number, all but number three are true as stated, but they omit facts critical to the consideration of the constitutional issues. As to number three, the transfer was not a demotion. *Burleson, supra*, 872 So.2d at 48; Pet. App. 5-6, 20.

The relevant facts, as found by the Civil Service Commission and as found in the record before that Commission, are as follows:

The false arrests. In 1999, when the seller of a car complained to the petitioner deputy that a buyer had failed to make payments on a note, the deputy told her it was a civil case but offered his opinion that the buyer might be guilty of false pretenses. He then personally typed out an arrest warrant, and told the seller how to file it to have the buyer arrested. The seller did that. The deputy put the charge in the NCIC computer. The police in another state arrested the buyer and held her in jail for 12 hours. When the sheriff heard about the arrest, he called the other state and had the buyer released. As it turned out, the payments had been made. The buyer sued the sheriff and the county for false arrest. *See* 5:9-10, 49-51; 6:10-12.

In the same year, a property caretaker reported the identification number of a vehicle abandoned on his employer's property. He met with deputies who examined the vehicle. The next day he heard on the radio scanner that the sheriff's department wanted the vehicle towed in so he went out and got it and started towing it in. The petitioner deputy showed up, got in a dispute about who was to tow the car, and had the caretaker arrested for possession of stolen property. 5:1-13, 71-74; 6:13-15. Again, the sheriff had to intervene to get the man released from jail. *Id.* Another suit was filed.

The discharge. In 1999, after the car buyer sued, the sheriff changed the deputy's job assignment from one that involved investigation and monitoring the radio to one that kept him on patrol. The Civil Service Commission and the Mississippi courts found this was not a demotion, Pet. App. 20, and the deputy did not treat it as such, i.e., he did not appeal the decision within 10 days.

Then in January 2000, the man with whom the deputy had argued sued. When the county insurance came up for renewal, the insurance company identified the deputy as a "multiple claim" risk because his conduct had resulted in two suits being filed within the past 12 months. He was the only such risk in the department. The insurer said it would have to increase the deductible if he remained on the force. 6:19.

The sheriff, as required in the absence of a full pre-termination hearing, offered him a post-termination hearing. He asked for a hearing within 20 days, did not get it, but then did not object to several continuances. *Burleson, supra*, 872 So.2d at 49; Pet. App. 9.

The hearings. A total of six people, including the discharged deputy, testified at the Civil Service Commission hearings. They testified to the facts stated above. The county attorney told the Civil Service Commission that he believed plaintiffs in both of the pending suits would get a directed verdict on liability. 6:15. The petitioner's counsel chose not to cross-examine him on that point, and instead concentrated on damages and qualified immunity. The sheriff who fired the petitioner said " . . . I always had a policy that you investigate, and then arrest. I think Investigator Burleson at that time was doing a lot of investigating before he was arresting." 5:13.

The Civil Service Commission findings. Under the special legislation which governs the Hancock County Civil Service Commission, the sheriff had the right to discharge the deputy for the conduct in the lawsuits if it reflected "inattention to duty", "incompetence" or "discourteous treatment of the public." Pet. App. 43. The sheriff had the right to do so without a pre-termination hearing if continued employment was "detrimental to the interest of the county government or the sheriff's department." Pet. App. 43. Finally, the Commission is to uphold the decision to discharge the deputy if it found that the discharge was "made in good faith for cause." Pet. App. 43.

The Commission found that the discharge squared with the legislative requirements for discharge:

> The Commission finds that George E. Burleson showed inattention to duty, incompetence, and discourteous treatment of the public, as well.

Pet. App. 21. It also found grounds for not giving the deputy a pre-termination hearing:

> The actions by [petitioner deputy] George E. Burleson in the Poole and Benvenutti cases (two citizens arrested by George E. Burleson) and resulting lawsuits against Hancock County and the Sheriff's Department, placed the Sheriff's Department and the County in danger of immediate injury to the County by losing its insurance if George E. Burleson were to continue in his employment. . . .

Pet. App. 21. Finally, it also found the discharge was in good faith:

> The Commission finds the termination of George E. Burleson was made in good faith and for cause, was supported by substantial evidence and was not made for political or religious reasons. (Note: George E. Burleson testified that he campaigned for [the new sheriff who fired him]).

Pet. App. 22.

In the Mississippi Court of Appeals, the petitioner deputy did not seriously challenge the accuracy of the facts concerning the lawsuits and insurance except to complain that he did not actually file the warrant that had the car buyer arrested, and to say that the caretaker needed arresting.[2]

---

[2] *See* Reply Brief for the Appellant Captain George E. Burleson, filed March 2003 in the Mississippi Court of Appeals, pp. 17-18.

REASONS FOR DENYING THE WRIT

I. The petitioner deputy received all the process that was due him under the due process clause.

The petitioner deputy has wholly failed to show what good additional process would have done him. As a result, he has no due process claim.

As stated in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), the process that is due depends on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest. . . .

Here the deputy had an interest in his job, but the County had an interest in expeditiously removing him so it could renew its insurance at a reasonable price. As long as the statements by the insurer were sincere and were correctly reported – and there is no doubt that they were – the deprivation could not be shown to be "erroneous," even if the deputy were given 10 more hearings to dispute the exact degree to which he was responsible for the lawsuits.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 542, 543 (1985), this Court held that some opportunity to be heard before termination was required where there were "arguable issues." But it suggested such an opportunity was not always required, particularly where an employee's side of the story was not needed to provide a "hedge against erroneous deprivation." *Id.* at 543 & n.8, *citing Dixon v. Love*, 431 U.S. 105, 113-114, 97 S.Ct. 1723 (1977). *See Mount Healthy v. Doyle*, 429 U.S. 274 (1974)

(no claim if same decision would have been reached absent constitutional violation).

More recently, in *Gilbert v. Homar*, 520 U.S. 924, 933-34 (1997), this Court repeated that due process is a flexible concept, and suggested the risk of an initial erroneous deprivation was slight when the employer relied on a third party's decision to arrest the employee and charge him with drug violations.

In this case, two plaintiffs had brought suit, the prior sheriff had been personally involved and had interviewed the petitioner deputy, 5:10-13, an insurer had accepted coverage, an attorney was defending the county and, in their collective opinions, the cases were good cases insofar as liability was concerned. The sheriff who fired him acted on recommendations that were ultimately based on all these opinions, even though he personally was not intimately familiar with the incidents. 5:10-13; 25; 39-40. It is difficult to imagine how further process could have benefitted the petitioner deputy. Certainly neither the briefs below nor the Petition for Writ of Certiorari provide any enlightenment on that point.

In fact, the deputy has never made any argument, much less a factual showing, that a pre-termination hearing, or more process at a post-termination hearing, would have helped his situation. Because he did not object to the "no-cross examination" rule, he did not attempt to cross-examine the witnesses for the purpose of a proffer only, or offer an affidavit from a non-witness that called into question the relevant testimony. As the Court of Appeals noted he also did not attempt to recall the witnesses as his own witnesses for the purpose of examining

them further. *Burleson, supra*, 872 So.2d at 50; Pet. App. 11.

To illustrate how abstract the deputy's claim is, it is worth comparing an allegedly conflicting case on which the amicus union relies, *Garraghty v. Commissioner of Va. Dep't of Corrections*, 52 F.3d 1274, 1284 (4th Cir. 1995). There the discharge rested on allegations of sexual harassment, which required resolution of a "he-said she-said" dispute between two persons with "bad blood" between them. In that context, the Fourth Circuit said the terminated employee should have a right to cross-examine witnesses.

But here there is no dispute as to what the insurer demanded. In addition, that demand is facially supported by the two complaints, introduced into evidence at the hearing, and the insurer's duty to defend and pay for the county's liability if the suits should be successful.

Because the deputy has not shown what good additional procedures would have done him, he has not made out a claim for deprivation of due process.

II. A lower state court's alleged misapplication of its own law does not present a federal question, nor does an alleged confusion within the Mississippi court system on a federal question merit certiorari.

Several of the questions that the petitioner deputy raises are either questions of state law, or are federal allegations that the facts just do not support and that attack an inferior state court decision. This Court has no

power to correct the first kind of question, and it has more important things to do than the resolve the second kind.

For example, the deputy asked for a hearing within 20 days, but then agreed to several continuances that stretched out the hearing process for several months. The 20-day requirement is a requirement of state, not federal law, and, even if that were not the case, the continuances are a state law waiver of any speedy hearing right.

Similarly, the complaint about being disciplined twice for the same thing is not only not true – the transfer was not discipline and the insurer's demand was not made until after he was transferred and another suit was filed – but it too arises under state law, not under federal law. The federal Double Jeopardy Clause applies only in criminal cases.

Third, the allegation of *ex parte* contacts is an odd one: apparently the Commission asked the county attorney and administrator to explain the matter before it held its hearing sometime later. 6:38. That did not violate the statute governing the Commission's proceedings and, even if it did, it does not present any federal question. The evidence at the official hearing supported the result. And the claim that the Open Meetings Act was violated is frivolous. That act contains a specific exemption that allows closed sessions for the purposes of "investigative proceedings by any public body regarding alleged misconduct . . ." Miss. Code. Ann. § 25-41-7(d). *See also* §§ 25-41-7(a) (personnel matters exemption), (k) (job performance exemption). Even if it did not, Mississippi does not invalidate official actions taken in violation of the law.

Nor is there any merit to the assertion of "unnoticed" charges of misconduct. The findings about which the petitioner deputy complains are inherent in any discharge, because they are things the sheriff had to prove in order to justify the discharge under the local Civil Service law. All the petitioner had to do was look at the law to be on notice of them.

Finally, the argument about Commission jurisdiction was not made to the Commission when it could have fixed the problem. The state courts held that it was waived. *Burleson*, 872 So.2d at 51. It is also wholly meritless, because Mississippi recognizes the validity of acts performed by "de facto" officials – those who hold office by claim of right but are later found not to have been fully qualified. *See* Miss. Code Ann. § 25-1-37 (acts of a de facto officer valid).

III. Neither the petitioner nor the amicus have identified any issue of exceptional importance.

Perhaps there is no respondent who does not believe that a petition depends on its unusual facts. But it is true that this Court has demanded a fact-specific inquiry in due process cases. For that reason, to create a conflict with the decisions of other courts, there must be a demonstrably common fact pattern.

The fact pattern here is different from that of all the cases cited by the petitioner and the amicus. Here the decision was not made by the employer on its own but was one suggested by an insurer with which the County has a contractual duty to cooperate and a financial need to

appease. Neither the petitioner nor the amicus have identified any case where the discharge depended in part on a third-party's beliefs concerning the liability risk that continued employment would pose.

Moreover, the conflicts claimed are thin. Many cases have gone into the books since *Loudermill*, yet the petitioner claims a conflict only with that case and some Mississippi cases he says have correctly applied it. The only flat conflict the amicus claims is with *Garraghty*, and it is readily distinguishable. One of the cases to which the amicus alludes, *Mitchell v. Frankhauser*, 375 F.3d 477 (6th Cir. 2004), supports the respondents. It says that a meaningful post-termination hearing can make up for an abbreviated pre-termination process and, without discussion, lists post-determination procedures that do not include cross-examination.

Finally, even the cross-examination question is not clear cut, because some cross-examination was allowed, state law does not prohibit cross-examination, the petitioner deputy's counsel did not ask for cross-examination, and the deputy has made no attempt to show how cross-examination or other process could have prevented him from being discharged.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LUTHER T. MUNFORD (MB #3653)
PHELPS DUNBAR LLP
111 E. Capitol Street, Ste. 600
P.O. Box 23066
Jackson, MS 39225
Telephone: (601) 352-2300

Counsel for Respondents

Of Counsel:

ALBERT NECAISE
2510 16th Street
P.O. Box 717
Gulfport, MS 39502-0717

(3)

SUPREME COURT, U.S.
FILED
NOV 22 2004
OFFICE OF THE CLERK

No. 04-180

In The

Supreme Court of the United States

GEORGE E. BURLESON

Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON

Respondents.

On Petition For Writ Of Certiorari To The Appeals Court Of The State Of Mississippi

PETITIONER'S REPLY BRIEF

JAMES BAILEY HALLIDAY, ESQ.*
Counsel for Petitioner
**Counsel of Record*
P. O. Box 6783
Gulfport, MS 39506
(228) 864-6564

Nov. 22, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

NEW QUESTIONS PRESENTED

I-VI. Respondents rephrase a number of Petitioner's questions creating seemingly new questions that are based on inaccurate and/or incorrect facts that are not part of the record before the Court. Regardless of how Respondents couch their questions, the core issues remain before the Court.

TABLE OF CONTENTS

	Page
New Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
INTRODUCTION	1
RESPONDENTS MISSTATEMENT OF THE CASE	2
1. Proceedings and Disposition in the Lower Courts	2
2. Respondents' Statement of Facts	4
RESPONDENTS' FLAWED REASONS FOR DENYING THE WRIT	7
I. Respondents argue that the Petitioner received all the process due and a pre-termination hearing was not required	7
II. Respondents desire this Court to allow constitutional due process requirements to be ignored by the courts in Mississippi	10
III. Respondents assert that no issue of exceptional importance has been identified	10
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Arnett v. Kennedy, 416 U.S. 134 (1974) 10

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 1, 2, 7, 9

Gilbert v. Homar, 570 U.S. 924 (1997) 2, 9

Goss v. Lopez, 419 U. S. 565 (1975) 10

Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004) 1

Mathews v. Eldridge, 424 U.S. 319 (1976) 8, 9

Richardson v. Perales, 402 U.S. 389 (1971) 4

STATUTES

Mississippi Tort Claims Act, MCA Sec. 11-46-1 et seq. (1993) 1

MCA Sec. 11-46-9(1)(a) et seq. (1993) 6

OTHER MATERIALS CITED

Transcript of Hancock County Sheriff's Department Civil Service Commission Hearing, Jan. 17, 2001 ... 3, 5, 6

INTRODUCTION

Respondents' unsupported assertions in their introduction concerning an insurance crisis are false. Lawsuits against public entities have not contributed to any insurance crisis in Mississippi. Respondents claim that juries are tempted to view public entities as "deep pockets" and that recent multi-million dollar verdicts have created an insurance crisis is also patently false.

In 1993, the Mississippi Legislature passed the *Mississippi Tort Claims Act*, MCA Sec. 11-46-1 et seq. (1993), creating an exclusive remedy against the state (or any political subdivision) wherein no public employee can be held personally liable for any judgments brought arising out of the course and scope of his/her employment. Further, any award against a political subdivision was limited to a statutorily set amount of damages of only $250,000. Finally, punitive damages cannot be awarded under the act. Therefore, a multi-million dollar award against a public entity was and is impossible.

However, even if Respondents' false assertions were true, that somehow Petitioner caused an insurance crisis, the due process protections afforded Petitioner could not be ignored. Respondents allege that "under these circumstances" the due process Petitioner received was "more than sufficient to protect him." What due process? Petitioner did not receive a pre-termination hearing. This Court has held that due process entitles a public employee to a hearing before he [or she] is deprived of any significant property interest. There is no argument that termination of a twenty-year law enforcement career is a significant property interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

As recently pronounced by this Court, even a citizen-detainee seeking to challenge his status as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut allegations at a hearing prior to any deprivation. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004). Petitioner, as a decorated career law enforcement officer, was given less due process than a

citizen captured on the field of battle fighting against his own county.

Respondents wish this Court to ignore fundamental law that once a state grants its citizen a property right, that property cannot be taken away without constitutionally protected and federally mandated due process. Respondents wish this Court to allow Mississippi politicians to keep their law enforcement officers in the "back of the bus" where they can continue to be treated as second-class citizens. Citizens whose rights, according to the Respondents, are not even worthy of invoking this Honorable Court's protection.

RESPONDENTS MISSTATEMENT OF THE CASE

1. Proceedings and Disposition in the Lower Courts

Respondents confess that Petitioner's statement of proceedings is generally correct. Thus, they admit that Petitioner was denied the federally mandated pre-termination hearing and was denied a timely post-termination hearing. Both hearings being procedural rights determined by this Court to be bedrock requirements of due process afforded a civil servant. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Gilbert v. Homar*, 570 U.S. 924 (1997).

Respondents ask the Court to disregard Petitioner's "invective", i.e. abusive language, against those who supervise law enforcement officers. What invective? There is no abusive language contained in Petitioner's statements to this Court, only earnest and truthful statements of the sorry state of affairs concerning how law enforcement officers continue to be treated as second class citizens in Mississippi as exemplified by the very facts of this case involving Petitioner. A pattern far too often repeated throughout the state.

Respondents refer to the Southern States Police Benevolent Association as a "policemen's union." A benevolent association, by definition, is not a "union" and exists only to protect its members as it is rightfully doing so

here. Unlike a union, a benevolent association cannot strike, have the 'blue flu' or conduct other disruptive activities that might affect the public safety.

Respondents also ask the Court to disregard Petitioner's invective against its citizens who exercise their constitutional rights to sue deputies or police officers who injure them. As the Court can readily discern from review of the petition before it, there is not one statement, invective or otherwise, by Petitioner or his fellow officers, concerning a citizen's exercise of constitutional rights. The very rights Petitioner and others daily risk their lives to protect but are being denied to them due to their continued second-class citizen status in Mississippi.

As Respondents are incorrect concerning these very basic things and recite fundamental misstatements as fact, as brought to the attention of the Court above, they are also incorrect concerning Petitioner's alleged failure to properly challenge the commission's abrupt denial of cross-examination after allowing cross of only the first witness at the first hearing. The commission chairwoman, Anne Williamson (an attorney), announced at the second hearing held in January 2001 that there would be no cross-examination as follows:

Mr. Capps (Counsel for Sheriff Garber): " . . . are you saying there's not going to be any cross-examination of the witnesses by the opposing attorney?"

Ms. Williamson: "That's right. No."

Mr. Halliday: " . . . We certainly raise our objection to no cross-examination."

Ms. Williamson: "Okay. It's noted. We note your objection."

See: Transcript of Hancock County Sheriff's Department Civil Service Commission Hearing, Jan. 17, 2001, page 3, lines 3-19.

Again, contrary to Respondents' statements, Petitioner raised the issue of denial of this fundamental procedural right of confrontation at every level including during argument before the Mississippi Court of Appeals.

The Mississippi Court of Appeals acknowledged Petitioner properly raising this argument commenting that (at the post-termination hearing held on January 17, 2001): "The other side also was denied the opportunity to cross-examine witnesses." App. A, 11a.

Denial of the right to confront witnesses by cross-examination during disciplinary civil service hearings is a violation of due process as made clear by this Court. *Richardson v. Perales*, 402 U.S. 389 (1971). Respondents are well aware that they violated Petitioner's fundamental due process rights by denying his right to confront the witnesses against him. Thus, Respondents factually flawed and legally defective argument attempting to tell this Court that it cannot even consider the issue because Petitioner failed to object when the transcript of the hearing clearly reflects that he did and his objection to no cross-examination was noted but overruled and is discussed by the Mississippi Court of Appeals.

2. Respondents' Statement of Facts

Respondents admit that Petitioner's succinct and definitive statements of fact are true, disputing only part of number three. Regardless of whether, Petitioner was demoted or transferred, all testifying witnesses confirmed that Petitioner was "disciplined" by this action (demotion or transfer) and disciplined specifically for the same reason he was later terminated. This testimony was confirmed by the civil service commission calling the transfer a "disciplinary event" in its Findings of Fact. Pet. App. C, 20c.

However, Respondents after admitting that Petitioner's facts are true, then incorrectly recite and discuss those admitted facts in an attempt to discredit the Petitioner and dissuade the Court of the importance and the magnitude of the issues presented by the Petitioner for review. Therefore, Petitioner will address the Respondents incorrect version of the facts.

The False Arrests

Respondents state that the Petitioner, "personally typed out an arrest warrant, and told the seller how to file it to have the buyer arrested." If this were not such a serious matter (not only for Petitioner but all law enforcement and indeed all civil servants), this errant statement would be comical as it exemplifies the Respondents' complete lack of understanding of the inherent workings of the criminal justice system. Neither Petitioner, nor any law enforcement official, can simple type out an arrest warrant and have a complaining citizen "file it" to have another citizen arrested. It is fundamental procedure that a judicial officer must first independently review the supporting allegations of criminal conduct and then sign an arrest warrant for that warrant to be executed.

The record is clear that Petitioner did not file an affidavit alleging a crime on behalf of a complaining citizen in the first alleged false arrest and only (in fulfilling a corollary duty as a clerk) typed out an affidavit for the citizen to sign, and explained to the citizen how to present it to a judge for consideration. The citizen did so and a judge independently (Petitioner was not present) then issued an arrest warrant based on the citizen's sworn affidavit. See: Transcript of Hancock County Sheriff's Department Civil Service Commission Hearing, Jan. 17, 2001, testimony of Sheriff Ronnie Peterson at pages 7-10 and testimony of George Burleson at pages 49-51.

Contrary to Respondents assertions of liability for this and another circumstance allegedly involving a second false arrest by Petitioner, thus causing an insurance crisis, neither the Petitioner nor the Respondent Sheriffs or their political subdivision had little if any liability as Mississippi law has certain statutory exemptions for a governmental entity and its employees acting within the course and scope of their employment or duties. The exemptions are numerous under the specific circumstances delineated in the Mississippi Code Annotated. The statutory exemptions to liability applying to the two minor claims involving Petitioner are:

1. "Arising out of a legislative or judicial action or inaction, . . . or judicial nature;" MCA Sec. 11-46-9(1)(a) (1993)
2. "Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;" MCA Sec. 11-46-9(1)(c) (1993)

As an independent judicial officer signed the arrest warrant leading to the alleged false arrest and the information presented to the issuing judicial officer was presented independently by a complaining citizen, not Petitioner, no liability accrued to Petitioner nor Respondent Sheriffs or the political subdivision they represented.

In the second alleged circumstance of false arrest involving Petitioner, again no liability accrued to Petitioner nor Respondent Sheriffs or the political subdivision they represented. Contrary to the incorrect selective recitation of 'facts' concerning the second circumstance, a citizen was found in possession of stolen property, refused to release the property and was consequently arrested by Petitioner. The arrested citizen was taken directly to the sheriff's office where the sheriff released him within the hour. See Transcript of Hancock County Sheriff's Department Civil Service Commission Hearing, Jan. 17, 2001.

Regardless, any dispute as to Respondents version of the facts is not relevant, as nothing in the record documents that the arrested citizen was injured or that Petitioner acted in disregard of the citizen's safety or well being. He was merely arrested, taken to the sheriff's department and subsequently released. Under these circumstances, even assuming for argument's sake, that Petitioner's actions resulted in a mistaken or false arrest, no liability accrued due to the legislatively enacted statutory preclusion preventing such liability. MCA Sec. 11-46-9(1)(c) (1993). These two cases cited by Respondents to have caused or significantly contributed to the alleged 'insurance crisis' were both

eventually dismissed without judgment or other findings against the Petitioner.

Respondents' Version of the Discharge; The Hearings; The Civil Service Commission findings.

Respondents basically argue that Petitioner was not entitled to a pre-termination hearing if Petitioner's continued employment was detrimental to the interests of the government, i.e. the alleged "insurance crisis." While Petitioner has consistently denied any wrongdoing and demanded proof of the alleged 'crisis' from Respondents, substantial and credible proof was never provided and is not in the record of any of the proceedings below that Petitioner's actions detrimentally affected his employer. Regardless, this Court has stated that an employer perceiving a threat by continued employment of an accused civil servant may suspend the employee with pay pending a *Loudermill* pre-termination hearing. The employer may not, as Respondents did here, terminate Petitioner without a pre-termination hearing and subsequently deny him a timely post-termination hearing leaving him without income for over six months until he was first partially presented with the evidence against him. Regardless of Respondents reliance on their own pronouncements (civil service commission's findings) and that of the Mississippi Court of Appeals, this Court has held such actions violate due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

RESPONDENTS' FLAWED REASONS FOR DENYING THE WRIT

I. Respondents argue that the Petitioner received all the process due and a pre-termination hearing was not required.

Respondents assert that Petitioner has "wholly failed" to show what good additional process would have done him and as a result has no due process claim.

Respondents are incorrect that the due process due Petitioner relied solely on a *Mathews* factor analysis concerning a pre-termination proceeding. While it is true that the *Mathews* balancing factors are to be considered concerning what amount of procedural process is due concerning a governmental employee's suspension, the Court has made it abundantly clear what minimum process is due prior to an employee's termination. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

This Court's holding in *Loudermill* set forth the minimum requirements that must be followed prior to employment termination. The record clearly reflects that these procedures were not followed. Petitioner did not, prior to termination, receive the minimum required due process of:

1. Proper notice of the charges against him (in fact Petitioner was never notified of any charges against him, only that he was an 'insurance risk') (and only learned of charges of misconduct when the civil service commission was ordered by the Mississippi Court of Appeals to issue a ruling explaining Petitioner's termination).
2. An explanation of the charges and reason for his termination.
3. An opportunity to explain.

Respondents are asking this Court to ignore the minimum constitutionally required safeguards concerning termination of employment as set forth in *Loudermill* and are arguing that they should have discretion over what due process is afforded prior to termination.

This Court is well aware of the importance of a pre-termination hearing as explained in *Loudermill*. This is the only opportunity for an employee facing termination to invoke the discretion of the decision maker.

Respondents are incorrect that Petitioner has failed to show this Court what good "additional process" would have done him and assert he has no due process claim. Further, Respondents assert that even if the Petitioner

was "given 10 more hearings," the deprivation could not be shown to be "erroneous."

Certainly, with the grossly delayed and due process deficient post-termination 'hearings' Petitioner received, Respondents may be correct. However, with a proper sequence of timely hearings, both pre- and post-termination and with at least the minimum due process procedures afforded at those hearings, Petitioner may very well have been able to show that his termination was improperly based on erroneous information and incorrect legal presumptions and further that he was being punished twice for the same set of mistaken circumstances.

Respondents are asserting that this Court should replace *Loudermill* pre-termination requirements with the flexible *Homar* pre-suspension due process based upon the *Mathews* balancing factors. This Court's decision in *Homar* can be readily distinguished and does not apply to the due process required prior to termination.

Respondents repeatedly assert that Petitioner has "not shown what good additional procedures would have done him" and therefore has not made out a claim for deprivation of due process. Respondents cite no controlling authority for this incorrect legal conclusion.

This argument is specious at best as a pre-termination hearing with proper notice of the charges, an explanation of those charges and an opportunity to explain his side of the story would have afforded the Petitioner the opportunity to invoke the discretion of the decision maker in his favor. A timely post-termination hearing (within twenty days instead of over six months), that allowed full review of any evidence and confrontation of the witnesses against him, would certainly have allowed the Petitioner the opportunity to properly challenge his termination. Importantly, the commission would not have had the opportunity to repeatedly meet in secret with the adverse witnesses against him, while the Petitioner repeatedly demanded a hearing and to be properly advised of the reason he was terminated.

II. Respondents desire this Court to allow constitutional due process requirements to be ignored by the courts in Mississippi.

Respondents argue that this Court should allow the Mississippi courts to misinterpret, ignore and/or reinterpret state civil service law arguing that such interpretations are not a matter worthy of this Court.

This Court has soundly and repeatedly rejected this argument. Once a state grants a property interest to its citizens, the state cannot then take away that property without comporting with the constitutional due process protections inherent in the Fifth and Fourteenth Amendments to the Constitution as made clear by this Court. *Goss v. Lopez*, 419 U. S. 565 (1975).

This Court has held that federal due process protects civil servants such as Petitioner and that state enacted civil service rules and regulations must be followed. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

III. Respondents assert that no issue of exceptional importance has been identified.

There are a number of issues of exceptional importance that have been identified including whether or not a state may ignore its own civil service rules and regulations and may ignore constitutional protections requiring pre-termination and timely post-termination due process. Further, the treatment of the Petitioner is shocking considering now that Respondents argue that a decorated twenty-year law enforcement veteran should be afforded less procedural protections than a school child or even an enemy combatant.

CONCLUSION

The extent of due process afforded public servants and law enforcement officers prior to and after termination is at issue here and this Court is urged to grant certiorari to provide appropriate guidance for lower courts to resolve existing confusion and disparity.

Respectfully submitted,

GEORGE E. BURLESON
By and through his attorney

JAMES BAILEY HALLIDAY
Attorney at Law
P. O. Box 6783
Gulfport, MS 39506
Tel.: (228) 864-6564

November 22, 2004

MOTION FILED
SEP 3 - 2004

(2)

No. 04-180

In The
Supreme Court of the United States

GEORGE E. BURLESON,
Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION; HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF MISSISSIPPI

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE NORTH CAROLINA AND SOUTHERN STATES POLICE BENEVOLENT ASSOCIATIONS IN SUPPORT OF PETITIONER

J. Michael McGuinness
Counsel of Record for Amici
THE McGUINNESS LAW FIRM
Post Office Box 952
2034 Highway 701 North
Elizabethtown, North Carolina 28337
(910) 862-7087

Counsel for Amici Curiae

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2003

GEORGE E. BURLESON,

Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT
CIVIL SERVICE COMMISSION;
HANCOCK COUNTY SHERIFF STEVE GARBER
AND FORMER HANCOCK COUNTY SHERIFF
RONALD PETERSON,

Respondents.

On Petition For Writ of Certiorari To The
Court of Appeals For The State of Mississippi

MOTION OF NORTH CAROLINA AND SOUTHERN STATES POLICE BENEVOLENT ASSOCIATIONS TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER.

Pursuant to Rule 37 of this Court, Amicus Curiae North Carolina and Southern States Police Benevolent Associations (hereinafter PBA or Amici) hereby move this Court for leave to file the accompanying brief in

support of the petition for writ of certiorari filed by Petitioner Burleson.

The Petitioner has consented to the filing of the accompanying brief by Amici; counsel for the Hearing Office has no position but advised that there was no objection. However, Respondent Hancock County Sheriff's Department does not consent for amici to appear therefore necessitating this motion.

INTEREST OF THE AMICI

The North Carolina and Southern States Police Benevolent Associations are non-profit voluntary associations of law enforcement officers. Amici promote and protect the interests of their members and the law enforcement profession through legislative advocacy, publishing, scientific studies, grass roots advocacy and litigation.

Amici and the law enforcement profession are vitally concerned with a dangerous developing trend of fundamental denials of procedural due process for law enforcement officers. The law enforcement profession is the most abused and violated class of public employees in America. Employment relations within the law enforcement profession present issues of national import, especially with the current strained budgets, homeland security burdens and continual assaults on the law enforcement profession from multiple sources. Rank and file officers regularly suffer the most devastating

deprivations of basic constitutional and civil rights.[1] Police officers with protected property interests critically need fundamental procedural due process because, *inter alia*, it is critically necessary to protect their jobs, careers and lives.

Many law enforcement officers like Officer Burleson are often completely denied due process. Others are often afforded only a watered down meaningless cosmetic version with inadequate procedures. Clarity of the law by this Court will reduce this uncertainty and promote more efficient delivery of police services.

This Court should grant certiorari to correct the palpable conflict created by the Mississippi Court below and instruct the lower courts and police agencies regarding what process is due including whether and the extent that confrontation and cross examination of adverse witnesses is constitutionally mandated in post deprivation hearings where there are disputed issues of fact or debatable issues of just cause for discipline.

---

[1] See e.g., Kirby v. Elizabeth City, __ F.3d __ , 2004 WL 1874412 (2004); N.C. Depart. of Environment and Natural Resources v. Clifton Carroll, (2004 WL 1801774, N.C. Sup. Ct., August 13, 2004); Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999).

The due process denial below is especially egregious and Officer Burleson was clearly denied what this Court required in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985). There, this Court held that the Due Process Clause entitles a protected employee to a minimal form of process "*before* he [or she] is deprived of any significant property interest..." (emphasis added).

The case *sub judice* is representative of a trend of misconduct against the law enforcement profession whereby police officers are either completely denied due process or are consistently afforded substantially less due process than everyone else, even including declared enemy combatants. Hamdi v. Rumsfield, 124 S.Ct. 2633, 2648 (2004)(relying upon the Loudermill standard).

The decision below by the Mississippi Court of Appeals, if allowed to stand, will adversely affect Amici and the constitutional rights of law enforcement officers throughout America.

Amici have successfully litigated other law enforcement employment cases and have appeared as amicus curiae in constitutional litigation involving the due process rights of law enforcement officers. SSPBA has appeared as amicus curiae on several occasions before this Court, and before other federal appellate and state supreme courts.

Many of America's public sector employees make life better for the rest of us. Law enforcement officers, school teachers, firefighters, public health workers, emergency response personnel, social workers, corrections officers, and countless others who administer

the day-to-day delivery of governmental services need effective procedural due process in order for governmental administration to efficiently function.

The accompanying amicus brief highlights some of the dangers associated with the Mississippi decision below. While the petition for certiorari raises several compelling issues, the brief of Amici seeks to clarify points not already brought to this Court's attention and will offer additional authorities further demonstrating the need for granting the writ.

Wherefore, Amici respectfully move the Court for leave to file the accompanying amicus brief.

Respectfully submitted,

*J. Michael McGuinness**
The McGuinness Law Firm
P.O. Box 952
2034 Highway 701 North
Elizabethtown, N.C. 28337
910-862-7087 Telephone
910-862-8865 Facsimile

*Counsel of Record For Amici

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause requires that a law enforcement officer with a protected property interest in employment be afforded minimum procedural due process protections *before* imposing a termination of employment?

2. Whether the Due Process Clause provides that a law enforcement officer with a protected property interest is entitled to confront and cross examine adverse witnesses in a post-termination hearing to contest the officer's termination of employment where there are disputed issues of fact or debatable issues regarding whether there is just cause for discipline?

3. Whether a Mississippi civil service regulation may authorize deprivations of employment entitlements that are otherwise unconstitutional under the Due Process Clause?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. INTEREST OF THE AMICI 1

II. STATEMENT OF THE CASE AND FACTS 2

III. REASONS FOR GRANTING THE WRIT 2

A. SUMMARY OF ARGUMENT 2

B. THE ISSUES PRESENTED CONCERNING THE SCOPE OF DUE PROCESS PROTECTIONS FOR POLICE OFFICERS CONSTITUTE QUESTIONS OF EXCEPTIONAL PUBLIC IMPORTANCE; THE MISSISSIPPI COURT OF APPEALS BELOW MISCONSTRUED THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHICH HAS RESULTED IN CONFLICTING DECISIONS WITH PRECEDENT FROM THIS COURT WHICH JEOPARDIZE THE CAREERS OF PETITIONER BURLESON AND OTHER CAREER POLICE OFFICERS 6

C. THE MISSISSIPPI DECISION CONFLICTS WITH THIS COURT'S LOUDERMILL PRINCIPLES INCLUDING THE RIGHT TO PREDEPRIVATION PROCESS AND THE EXTENT OF POST-DEPRIVATION PROCESS 7

D. THE RATIONALE FOR PROCEDURAL DUE PROCESS PROTECTIONS 10

E. PUBLIC EMPLOYEES INCLUDING LAW ENFORCEMENT OFFICERS ARE CONSTITUTIONALLY ENTITLED TO A POST-TERMINATION HEARING ON THE MERITS WITH CONFRONTATION AND CROSS EXAMINATION RIGHTS WHERE FACTS ARE DISPUTED OR ISSUES REGARDING JUST CAUSE FOR DISCIPLINE ARE DEBATABLE 14

IV. CONCLUSION 16

TABLE OF AUTHORITIES

PAGE(S)

CASES

Auriemma v. Rice,
910 F.2d 1449 (7th Cir. 1990) 6

Board of County Commissioners v. Umbehr,
116 S. Ct. 2342 (1996) 12

Boddie v. Connecticut,
401 U.S. 371 (1971) 8

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) ..... passim

Contoir v. University of Maine,
35 F.3d 6 (1st Cir. 1994) 9

Ferguson v. Thomas,
430 F.2d 852 (5th Cir. 1970) 15

Fields v. Durham,
909 F.2d 94 (4th Cir. 1990) 13

Garraghty v. Comm. of Va.,
52 F.2d 1274 (4th Cir. 1995) 9, 15

Garrity v. New Jersey,
385 U.S. 493 (1967) 5

Gilbert v. Homar,
117 S. Ct. 1807 (1997) 8

Glass v. Dachel,
2 F.3d 733 (7th Cir. 1993) 6

Goldberg v. Kelly,
397 U.S. 254 (1970) 15

Greene v. McElroy,
360 U.S. 474 (1959) 15

Hudson v. City of Chicago,
374 F.3d 554 (7th Cir. 2004) 14

Joint Anti-Facist Committee v. McGrath,
341 U.S. 123 (1951) 13, 16

Konraith v. Williquette,
732 F. Supp. 973 (W.D. Wis. 1990) 6

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803) 9

Matthews v. Eldridge,
424 U.S. 319 (1976) 13

McNabb v. U.S.,
318 U.S. 332 (1947) 13, 16

McNeill v. Butz,
480 F.2d 314 (4th Cir. 1973) 15

Mitchell v. Frankhauser,
2004 WL 1562189 (6th Cir. 2004) 14

Morris v. City of Danville,
744 F.2d 1041 (4th Cir. 1984)..... 15

Morrison v. Warren,
2004 WL 1522361 (6th Cir. 2004)..... 14

Morrissey v. Brewer,
408 U.S. 471 (1972) 13

N.C. Depart. of Environment and
Natural Resources v. Clifton Carroll,
2004 WL 1801774, N.C. Sup. Ct.,
(August 13, 2004) 11

Nevels v. Hanlon,
656 F.2d 372 (8th Cir. 1981)..... 15

Thomas v. Ward,
529 F.2d 916 (4th Cir. 1975)..... 15

United States v. James Daniel Good Real Property,
510 U.S. 43, 114 S. Ct. 492 (1993)..... 9

Waters v. Churchill,
114 S. Ct. 1878 (1994) 12

ARTICLES

Equal Protection For Non-Suspect Class Victims
of Governmental Misconduct:
Theory and Proof of Disparate Treatment
and Arbitrariness Claims, 18 Campbell L.
Rev. 333 (1996)..... 12

Procedural Due Process Rights of
Public Employees:
Basic Rules and A Proposal for Return to
Rule Oriented Process,
33 New England L. Rev. 929 (1999) 3

BOOKS

Officer Survival Tactics, N.C. Highway Patrol 11

Representing Law Enforcement Officers in
Personnel Disputes and Employment Litigation,
77 American Jurisprudence Trials 1 (2000) 2

Senator Sam J. Ervin, Jr.,
Preserving The Constitution (1984) 12

Boward, Lost Rights:
The Destruction of American Liberty 12

The Rights of Law Enforcement Officers
(4th ed. 2000) 2

I. INTEREST OF THE AMICI

The North Carolina and Southern States Police Benevolent Associations (hereafter PBA) are non-profit associations with over twenty thousand law enforcement officers and related public employees in an eleven state southern region. Amici engage in various types of advocacy, lobbying, litigation and scientific analyses of various law enforcement issues. Amici promote improved law enforcement and constitutional protection for everyone.

Amici are vitally interested in the grave constitutional issues before this Court because the decision below, *inter alia*, is palpably inconsistent fundamental constitutional protection for law enforcement officers. Law enforcement officers are frequently victims of constitutional torts, often in the employment context like the case *sub judice*.

The Mississippi legislature saw the need to protect police officers from the corruption of arbitrary discipline without just cause. However, unless courts honor and enforce the federal constitutional mandates enunciated by this Court, the legislative attempts by Mississippi and other states to provide property interests in police jobs will be futile.

In his petition for certiorari, Officer Burleson demonstrated the "do it" rule whereby Mississippi police agencies often openly disregard and defy federal constitutional mandates. This defiance subverts the rule of law and promotes selective enforcement of our nation's fundamental charter. Amici have encountered the "do it" rule throughout the south for decades. The

"do it" rule breeds employment retaliation, discrimination, corruption and a host of related ills which frustrates the dangerous mission of front line police officers and impedes the efficient delivery of law enforcement services.

The vast body of growing and unclear case law demonstrates how law enforcement officers are frequently subjected to constitutional deprivations and other workplace injuries that adversely affects the delivery of police services and public safety.[1] There is a compelling need for this Court to grant the writ to clarify the law and guide the lower courts and police employers regarding the specific constitutional mandates in police termination hearings.

II. STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts as presented by Petitioner.

III. REASONS FOR GRANTING THE WRIT

A. SUMMARY OF ARGUMENT.

The Mississippi Court below issued a decision palpably inconsistent with settled precedent from this Court. Law enforcement officers who enjoy a property

---

[1] See, e.g. Representing Law Enforcement Officers in Personnel Disputes and Employment Litigation, 77 American Jurisprudence Trials 1 (2000); The Rights of Law Enforcement Officers (4th ed. 2000).

interest[2] in their jobs are constitutionally entitled to procedural due process before they are terminated. The minimum process due consists of predeprivation notice and opportunity to be heard before the deprivation coupled with a more complete post-deprivation process including cross examination and confrontation of adverse witnesses.

In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985), this Court held that the Due Process Clause entitles a public employee to a hearing "before he [or she] is deprived of any significant property interest..."[3] The Mississippi decision below violates the core of Loudermill, and if followed, would erode fundamental constitutional protections necessary for police officers to survive.

The dissenting opinion of Justice Southwick, joined by Justices McMillin and Griffis, demonstrates some of Petitioner's concerns. The dissent shows how the majority decision below failed to apply this Court's precedent in Loudermill.

---

[2] Petitioner enjoyed a property interest in his job as per the just cause provision in Mississippi Code Sections 21-13-21 and 21-13-23. The Mississippi Court found that Petitioner enjoyed a property interest. See decision at paragraph 17, at page 8 in the Appendix.

[3] See Procedural Due Process Rights of Public Employees: Basic Rules and A Proposal for Return to Rule Oriented Process, 33 New England L. Rev. 929 (1999).

Certiorari should be granted to resolve the conflict between the Mississippi Court below and settled precedent from this Court on the point that minimum predeprivation process is required. Certiorari should also be granted to resolve conflicting decisions on the point of how much process is due in the second stage of Loudermill due process hearings.

A plethora of similar issues arise every day in law enforcement and other public sector workplaces throughout America. The extent of due-process protection, especially to police officers who are often viewed as targets for complaints and lawsuits, essentially determines the efficiency of police services. Thus, the issues involved are paramount public safety concerns.

Officers need predeprivation procedural protection before terminations because pre-deprivation process often demonstrates the falsity or inaccuracy of allegations against officers and therefore avoids the initial imposition of unjust punishment. Post-deprivation process alone is not adequate because even full awards of backpay cannot repair the permanent damage inflicted upon officers who are permanently stigmatized with a termination. Even if the termination is reversed, agencies retain records of the termination and the officer must disclose even a reversed termination to future prospective employers.

Petitioner was accused of being "an insurance risk," whatever that means. The Mississippi Court observed that "this risk stemmed from two separate lawsuits filed against the Sheriff's Department based upon actions of Burleson." The Court did not observe or find if the alleged lawsuits were meritorious or frivolous.

Serving as a law enforcement officer necessarily puts one at risk of lawsuits because officers have to deal with unwanted "customers" who often seek to obtain leverage. An alleged lawsuit does not mean that any violations of law occurred. Most all of America's law enforcement officers are sued numerous times throughout a law enforcement career. Getting sued goes along with the law enforcement turf.

The allegations against Petitioner raised issues that were fact based and debatable. Consequently, there was a need for witnesses to offer facts about what occurred. Finally, the bottom line of the termination hearing below was to address whether there was *just cause* for Petitioner's discipline. Thus, there were numerous *debatable issues, factual disputes* and reasons to have a traditional due process hearing with meaningful traditional process.

Effective predeprivation procedural due process under the Loudermill standard can be conducted in a matter of minutes. The benefits to officers, agencies and the public far outweigh any conceivable administrative burdens associated with such minimum process. Affording predeprivation due process is simple, without significant burden, but is vitally important in the overall scheme of constitutional protection for law enforcement officers who are subjected to daily risks of death for their public service.

This Court has held that law enforcement officers are not relegated to a "watered down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). To fulfill that time honored principle, this Court must reverse the Mississippi Court below. The

constitutional rights of law enforcement officers "must be afforded great weight." Konraith v. Williquette, 732 F. Supp. 973, 978 (W.D. Wis. 1990).

B. THE ISSUES PRESENTED CONCERNING THE SCOPE OF DUE PROCESS PROTECTIONS FOR POLICE OFFICERS CONSTITUTE QUESTIONS OF EXCEPTIONAL PUBLIC IMPORTANCE; THE MISSISSIPPI COURT OF APPEALS BELOW MISCONSTRUED THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHICH HAS RESULTED IN CONFLICTING DECISIONS WHICH JEOPARDIZE THE CAREERS OF PETITIONER BURLESON AND OTHER CAREER POLICE OFFICERS.

The proper functioning of police officers and agencies is a matter of vital public importance throughout the nation.[4] The Mississippi Court below erroneously elevated a local civil service regulation to supersede the Due Process Clause of the Fourteenth Amendment. The pertinent civil service regulation provides in relevant part that "the sheriff may in his discretion provide for a pretermination hearing and examination of witnesses, and if a hearing is to be held,

---

[4] See Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990)(en banc)("it would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety"); Glass v. Dachel, 2 F.3d 733, 741 (speech that focuses on police departments and ultimately police protection and public safety involve matters of great public concern.").

the notice to such employee shall also set the time and place of such hearing." However, the Mississippi State Code provides a property interest to Officer Burleson as per Sections 21-13-21 through 21-13-23. The Mississippi Court below interpreted the life out of the Due Process Clause.

C. THE MISSISSIPPI DECISION CONFLICTS WITH THIS COURT'S LOUDERMILL PRINCIPLES INCLUDING THE RIGHT TO PRE-DEPRIVATION PROCESS AND THE EXTENT OF POSTDEPRIVATION PROCESS.

The Mississippi Court cited Loudermill and its requirement that protected public employees must be afforded a pretermination hearing. See paragraph fourteen of the decision of the Mississippi Court of Appeals, which appears in the appendix to the petition for certiorari at 7. However, despite recognizing this fundamental due process principle, the Mississippi Court failed to apply the principle and concluded that there was no due process violation despite the fact that there was no pre-depravation process provided. The logical import of the Mississippi Court's decision is to overrule this Court's precedent in Loudermill, which may lead other state courts to disregard or defy this Court's precedent. States are not free to legislate away constitutional protection.

Procedural due process rights for police officers are particularly important because procedural due process is often the only non-litigation check on an erroneous personnel decision that may ruin the career of

a law enforcement officer. The essence of procedural due process "reflects a fundamental value in our American constitutional system." Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

In Loudermill, this Court held that in the predeprivation stage, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill established a two-stage procedure for minimum predeprivation process combined with a full post-termination hearing.

In Gilbert v. Homar, 117 S. Ct. 1807, 1811 (1997), this Court interpreted Loudermill to mean that a public employee with a protected interest was constitutionally entitled to a "very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing." Gilbert did not define the terms "very limited" and "more comprehensive."

In Loudermill, this Court determined what predeprivation process must be afforded a public employee in connection with termination:

> We have described the "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest".... some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision... Even where the facts are clear, the

> appropriateness or necessity of the discharge may not be; in such cases the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect....The ... employee **is entitled to oral or written notice of the charges against him an explanation of the employer's evidence, and an opportunity to present his side of the story.** (emphasis added).

Loudermill established a two-stage procedure for minimum predeprivation process combined with a full post-deprivation hearing. Garraghty v. Comm. of Va., 52 F.2d 1274, 1283 (4th Cir. 1995). First, a minimum predeprivation process must be provided before any adverse action can be taken. Second, a full post-deprivation hearing must be provided. Id.; Contoir v. University of Maine, 35 F.3d 6, 12-13 (1st Cir. 1994). This recognition of "stages" of due process underscores the importance and fundamental nature of predeprivation process.

This Court has held that absent "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event," the government must provide the hearing before the deprivation takes place. United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 501 (1993).

The Due Process Clause lives to fulfill the thrust of Marbury v. Madison[5] - that "the very essence of civil liberty certainly consists in the right of every individual

---

5 5 U.S. (1 Cranch) 137, 163 (1803).

to claim the protection of the laws, whenever he receives an injury." In Loudermill, this Court held that the Due Process Clause entitles an employee to a hearing "before he [or she] is deprived of any significant property interest..." (emphasis added) 470 U.S. at 542. The Mississippi Court below failed to apply these fundamental principles.

D. THE RATIONALE FOR PROCEDURAL DUE PROCESS PROTECTIONS.

The laws governing law enforcement employment relations profoundly affects the efficiency and quality of law enforcement services and the daily lives of officers everywhere. Law enforcement agencies, officers and the public are better served by meaningful predeprivation procedural due process protections for officers. Procedural due process protection safeguards against mistakes and errors which can deprive an officer of his or her career. Similarly, an erroneous decision can deprive the agency of a good officer. With the tremendous cost of properly training new officers, it makes sound economic sense to afford predeprivation due process to officers as many officers will likely be saved from arbitrary and erroneous adverse employment action as in this case.

Predeprivation due process promotes efficiency in the workplace. It promotes employee confidence and positive morale. A positively motivated law enforcement workforce breeds an environment of collegiality, efficiency and esprit de corps. Without predeprivation due process, erroneous decisions go unchecked. Denials of due process frustrate the entire criminal justice system by demoralizing valuable officers and rewarding abusive management officials for their own misconduct.

Complaints against law enforcement officers continue to skyrocket, even for the most trivial feigned allegations.[6] Many of those complaints represent nothing more than angry citizens who have had an unpleasant encounter with an officer, which provoke an internal affairs investigation thus jeopardizing the officer. In many such encounters, law enforcement officers are spit on, harassed, assaulted, battered, stabbed, shot and killed. Over three thousand seven hundred law enforcement officers were murdered from 1945 until 1999, with an average of 66 police murders per year.[7]

---

[6] See e.g.,N.C. Depart. of Environment and Natural Resources v. Clifton Carroll, (2004 WL 1801774, N.C. Sup. Ct., August 13, 2004).

[7] U.S. Department of Justice, Federal Bureau of Investigation, cited in Officer Survival Tactics, N.C. Highway Patrol.

As government has grown, so has the power of governmental employers.[8] Americans from all walks of life need constitutional protection from increasingly arbitrary and oppressive government power, more often at the local level.[9] Contemporary law enforcement bureaucracies present vast opportunities for abusive bureaucrats to employ abusive tactics on personal missions of retaliation.[10] The tremendous volume of reported cases adjudicating the rights of law enforcement officers demonstrates the frequency and intensity of harassment of law enforcement officers.[11] As Senator Helms observed:

---

8 Millions of individuals are employed by more than eighty two thousand governmental units at local, state, and federal levels. As of 1991, more than 18 million persons were employed by local, state or the federal government. See Waters v. Churchill, 114 S. Ct. 1878, 1899 n. 3 (1994)(Stevens, J. and Blackmun, J., dissenting)(citing the 1991 figures from the U.S. Department of Commerce Statistical Abstract of the United States, Table No. 500, page 318 (113 ed. 1993).

9 See Senator Sam J. Ervin, Jr., Preserving The Constitution 165, 213 - 214 (1984); Boward, Lost Rights: The Destruction of American Liberty 1-6, 49 - 51 (1995); Equal Protection For Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims, 18 Campbell L. Rev. 333 (1996).

10 See Board of County Commissioners v. Umbehr, 116 S. Ct. 2342, 2347 (1996)(cataloging cases of government retaliation in different contexts).

11 See Silencing Government Employee Whistleblowers In The Name of "Efficiency", 23 Ohio Northern U. L. Rev. 17 (1996)(cataloging numerous cases demonstrating retaliation against police officers).

> "[T]oo often law enforcement officers lose their jobs for frivolous reasons - or for no reason at all." Senator Jesse Helms, Congressional Record, January 31, 1991.

The critical importance of procedural due process protections has long been emphasized. Many cases have "recognize[ed] and respect[ed] the role that procedural due process has played in preventing arbitrary deprivations of individual liberty and property..."[12] This logic, underscored by such historic decisions from this Court as Loudermill, McGrath and McNabb, demonstrate the importance of the time honored American tradition of procedural due process protection. This case demonstrates the need for this Court to clarify the law on the issues presented in the petition.

This Court has emphasized a flexible procedural due process approach whereby a balancing test is employed on a case-by-case basis to determine what particular process is due in a given situation. Matthews v. Eldridge, 424 U.S. 319 (1976). The precise requirements of procedural due process depend upon the particular circumstances, Morrissey v. Brewer, 408 U.S. 471, 481 (1972), but the essential fundamentals remain constant. In the public employment context, the "essentials" of procedural due process including the minimum predeprivation process and confrontation and cross examination rights in the post-termination hearing. This case raises these two critically important points.

---

12 Fields v. Durham, 909 F.2d 94, 99 (4th Cir. 1990).

The flexible approach has lead to confusion in the circuits and in police agencies.[13] However, in the case sub judice, the Mississippi Court denied the core minimum due process: 1) some minimum predeprivation procedural process; 2) followed by a post-termination hearing with the right to confront and cross examine adverse witnesses where there are any factual disputes or debatable issues.

E. PUBLIC EMPLOYEES INCLUDING LAW ENFORCEMENT OFFICERS ARE CONSTITUTIONALLY ENTITLED TO A POST-TERMINATION HEARING ON THE MERITS WITH CONFRONTATION AND CROSS EXAMINATION RIGHTS WHERE FACTS ARE DISPUTED OR ISSUES REGARDING JUST CAUSE FOR DISCIPLINE ARE DEBATABLE.

The Mississippi Court below further erred by allowing the Sheriff and Commission to deny Petitioner Burleson the right to cross examine witnesses based upon the purported civil service regulation. Once a property interest attaches, an employer must comply with constitutional due process. Cross examination is a critically necessary component of procedural due process especially in disputed public employee dismissal cases where facts, circumstances, credibility, and other such considerations are especially relevant.

---

[13] E.g. Hudson v. City of Chicago, 374 F.3d 554 (7th Cir. 2004); Mitchell v. Frankhauser, 2004 WL 1562189 (6th Cir. 2004); Morrison v. Warren, 2004 WL 1522361 (6th Cir. 2004).

While the majority opinion in Loudermill did not specifically address whether cross examination is required, the separate opinions of Justices Marshall and Brennan provide additional insight. They would require that employees have an opportunity to confront and cross-examine adverse witnesses where factual disputes are involved. That position is supported by a wealth of cases reaffirming the critical constitutional rights of confrontation and cross examination. See Greene v. McElroy, 360 U.S. 474, 496-97 (1959)(reaffirming history of requiring cross examination and confrontation); Goldberg v. Kelly, 397 U.S. 254, 269-70 (1970); Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981); Morris v. City of Danville, 744 F.2d 1041, 1047 (4th Cir. 1984); Thomas v. Ward, 529 F.2d 916, 919 (4th Cir. 1975); McNeill v. Butz, 480 F.2d 314, 321 (4th Cir. 1973). "Ceremonial compliance" with due process is constitutionally inadequate. Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970).

In Garraghty v. Comm. of Va., 52 F.3d 1274, 1282-83 (4th Cir. 1995), the Court found that the right to cross examine is necessary in a post-termination hearing but that pretermination confrontation rights are not constitutionally required. That is consistent with this Court's two stage process in Loudermill. This Court should adopt the approach in Garraghty.

Justice Brennan observed in Loudermill that whenever factual disputes are involved, an employee may deserve a pretermination opportunity to present contrary records or testimony, or to confront the accuser in front of the decision maker. Justice Brennan noted that factual disputes were not involved in Loudermill. However, in any event, the termination of Loudermill

involved debatable issues. Loudermill possibly could have framed a persuasive argument against his dismissal if he had been afforded a minimum pretermination opportunity to respond.

While cross-examination of adverse witnesses may not have been imperative in Loudermill, many employment disputes, including the one before the Court, often entail the sort of factual dispute or debatable issues in which cross-examination is absolutely essential.

IV. CONCLUSION

> "The history of liberty has largely been the history of observance of procedural safeguards." McNabb v. U.S., 318 U.S. 332, 347 (1947).
>
> "It is procedure that spells much of the difference between the rule by law and rule by whim or caprice." Joint Anti-Facist Committee v. McGrath, 341 U.S. 123, 179 (1951)(Douglas, J. concurring).

This Court should grant certiorari for the reasons set forth in the petition and in order to provide necessary clarifying guidance for lower courts to resolve disparity over the extent of due process protections available to public employees and law enforcement officers.

Wherefore, Amici respectfully pray that this Court grant the petition to resolve these important issues.

Respectfully Submitted,

*J. Michael McGuinness**
The McGuinness Law Firm
P.O. Box 952
2034 Highway 701 North
Elizabethtown, N.C. 28337
910-862-7087 Telephone
910-862-8865 Facsimile
jmichael@mcguinnesslaw.com
Counsel for Amici
Member,
United States Supreme Court Bar

**Counsel of Record for Amici*